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The Publisher, Staff & Editors

1987-1997

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Results: 10/25/97: four of six numbers with five 3 number matches

>From the Editor’s Desk...

There comes a time in every generation’s passing when people must stand up for what is right both morally and ethically. The time for my generation has come. Lately, its been easier and easier to find hate and terror on the ‘Net. Anti Semitism seems to be at an all-time high. What is WRONG with this world?? Didn’t we all either see or were taught that the Holocaust must never be allowed to even come close to happening again? I’m convinced many were taught just the opposite. My dear readers, while this topic may not be exclusively about computers. I must beg of each and every one of you to take a long hard look at the hate that’s going on in your neighborhoods, states and countries. If only each one of us would stand up and be heard expressing our contempt for the Jew-Baiters, Hate Mongers, Racists and especially those who would say the Holocaust is false.

It would be wonderful if We would all be able to rest just a little

bit easier knowing full well that the current generation of youngsters, worldwide, would not be mislead into believing the most horrible events perpetrated by Nazi Germany were false. Those who would and do teach this ghastly lie must be exposed for the Devils they are for it is they who will lead this and future generations to untold horrors. They are losing the benefit of learning from History. Must they be doomed to go through history repeating itself? Elsewhere in this issue, we illustrate but a few of the events that have rekindled my dismay over the rise of Neo-Nazis, political liars and ignorant fools (truly the hemorrhoids of Society) who insist upon poisoning the minds of youngsters. Please, if you and I mean all of you have even the slightest twinge of emotion about what is going on, then by all means stand up and be heard.

Of Special Note:

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STReport is now ready to offer much more in the way of serving the Networks, Online Services and Internet's vast, fast growing site list and userbase. We now have our very own WEB/FTP Site, do stop by and have a look see. Since We've received numerous requests to receive STReport from a wide variety of Internet addressees, we were compelled to put together an Internet distribution/mailing list for those who wished to receive STReport on a regular basis, the file is ZIPPED, then UUENCODED. Unfortunately, we've also received a number of opinions that the UUENCODING was a real pain to deal with. You'll be pleased to know you are able to download STReport directly from our very own FTP SERVER or WEB Site. While there, be sure to join our STR AutoMailer list which allows a choice of either ASCII or Acrobat PDF.

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LATE BREAKING INDUSTRY-WIDE NEWS

Weekly Happenings in the Computer World

Compiled by: Dana P. Jacobson

Sites for Au Pair Ruling Named

Court officials in Boston have listed 22 sites on the Internet's World Wide Web that will carry the news when a Massachusetts judge issues his decision on the fate of British au pair Louise Woodward, convicted of murdering a baby. As reported earlier, Middlesex County Superior Court Judge Hiller B. Zobel decided to use the Web to distribute his ruling, apparently worried that making paper copies available to reporters would overwhelm court clerks since interest in the case has been so high.

The Reuter News Service reports these site will initially carry the ruling:

´• ABC News, http://www.abcnews.com
´• AFP, http://www.afp.com
´• American Lawyer, http://www.counselconnect.com
´• Associated Press, http://wire.ap.org/woodward/
´• BBC NewsOn-Line, http://news.bbc.co.uk
´• Boston Globe, http://www.boston.com (keyword woodward)
´• Boston Herald, http://www.bostonherald.com
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´• CNN, http://www.cnn.com
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´• Lawyers Weekly, http://www.lawyersweekly.com
´• MSNBC, http://www.msnbc.com
´• National Law Journal, http://www.ljx.com
´• NBC (WHDH-TV), http://www.whdh.com
´• New England Cable News, http://www.necnews.om
´• N.Y. Post, http://www.nypostonline.com
´• Press Association, http://www.pa.press.net
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A jury convicted Woodward of second-degree murder last week for the February death of 8-month-old Matthew Eappen, a child she was looking after at the time. Reuters says Zobel is expected to rule, possibly as early as Monday, on whether the jury's verdict should stand, or be set aside, a new trial ordered, or whether the charges should be reduced.

Net Drops Ball in Au Pair Case

Cyberspace was a no-show today in the planned ground-breaking release on the Internet's World Wide Web of a Massachusetts judge's ruling reducing the British au pair Louise Woodward's conviction to manslaughter. As reported, the judge had planned to release his decision on the Net in order to avoid what he feared would be chaos in the clerk's office as reporters sought to make paper copies of the ruling in the high-interest case.

However, Middlesex County Superior Court Judge Hiller B. Zobel didn't count on the Internet's ability to spin chaos on its own. A power failure at an Internet service provider snarled the plans and required that the word get out by more conventional means. Middlesex County Court clerk Whitney Brown told the Reuter News Service, "The server had a power failure one minute before we were to issue the decision. It just totally crashed the system."

Superior Court Judge Zobel had intended that his decision would be issued only over the Internet at more than a score of sites. But plans were undone by a power outage in nearby Brookline, Massachusetts, where the Internet service provider, Software Tool & Die, is located. "The company was helpless," says Reuters. "To the delight of naysayers who predicted the system could not work, clerks quickly had to provide reporters at the courthouse with paper versions so the news could get out the old-fashioned way. The decision became available electronically 102 minutes later on the Internet, reaching Web sites at 11:42 a.m. EST after having been expected at 10 a.m. EST."

Woodward, 19, was convicted Oct. 30 of second-degree murder of 8-month-old Matthew Eappen and was given a mandatory sentence of life in prison, but that was changed by Zobel's ruling. As noted earlier, the ruling's posting on the Internet was to have been a first in Massachusetts and possibly the United States.

Net Hate Is Conference Topic

International experts have gathered in Geneva to debate if and how to combat the spread of computerized hate messages and the general use of the Internet as a forum for racism. "Binding global controls on the Internet are unlikely," says Associated Press writer Clare Nullis, "since the technology is changing faster than rules can be made, and because of free speech protections in the United States."

The week-long meeting of human rights activists, government officials and Internet service providers is sponsored by the United Nations as part of efforts to ensure compliance with a treaty banning racial discrimination. Agha Shahi of Pakistan, a member of the U.N. Committee on the Elimination of Racial Discrimination, told the wire service, "There are 148 countries who have accepted this convention and they are under obligation to enact measures to implement it. Are we going to say the Internet should be exempt from any kind of compliance with the rules of international behavior?"

While they agree the Net offers an open platform for racists, the experts also acknowledge there have been no studies linking racist computer dialogue to arise in racist incidents. Adds Nullis, "They say much of the problem originates in the United States, where groups such as the Ku Klux Klan, the Aryan Nations and skinheads base their Web sites. Under U.S. free speech guarantees, groups are permitted to post their views on the Internet."

AP notes Sweden and some other European countries have moved toward making Internet service providers responsible for the content they supply, "but participants said similar global restrictions wouldn't work without U.S. compliance, which is unlikely." Representing the U.S., Philip Reitinger of the Department of Justice told the gathering, "In our tradition, it is only through the clash of views in vigorous debate, and not through government censorship, that equality is well served. That principle -- one which accords freedom of expression the highest respect -- applies with equal force to the Internet."

Meanwhile, Eric Lee, of the Internet service provider Commercial Internet eXchange, said that while the U.S. computer industry is voluntarily working on ways to ensure that computer smut isn't accessible to minors, it is "not feasible and not desirable" for Internet providers to act as censors. Lee added, "There are so many ways to evade controls. Coming up with foolproof controls is virtually impossible."

Texas Sues Microsoft

In Texas, Microsoft Corp. has been accused by the state attorney general of undermining an investigation of possible antitrust violations. Reporting from Austin, United Press International says Texas Attorney General Dan Morales has filed a lawsuit alleging Microsoft requires all companies with which it does business to sign a contract requiring them to inform Microsoft before providing any information to state or federal antitrust investigators.

Morales says such requirements interfere with the attorney general's constitutional and statutory responsibilities to conduct unobstructed, confidential investigations, adding, "Microsoft's overwhelming market dominance intimidates computer makers whose very survival depends on having access to Microsoft's operating system software, which runs more than 90 percent of all personal computers sold today."

The suit asks the court to order that:

- Companies doing business with Microsoft are not required to comply with the provision of their licensing agreement that requires notification to Microsoft before providing information to investigators.
- Microsoft be ordered to notify all of its licensees that they don't have to comply with the notice agreement.

UPI says Morales already has asked Microsoft to voluntarily inform its licensees that they do not have to comply with the prior notice provision, but the company declined.

Sun Chief Urges Gates Be Spammed

The co-founder/CEO of Sun Microsystems has urged those attending a Berlin, Germany, technology conference to send a torrent of unsolicited electronic mail to rival Bill Gates, co-founder/CEO of Microsoft Corp. "Flood his mailbox," said Sun chief Scott McNealy. "Say that you want 100 percent pure Java." McNealy then even spelled his rival's email address at Microsoft, according to reports in The New York Times.

The paper says McNealy also urges software designers to stop using Microsoft development tools. "Microsoft is no longer a distributor of Java platforms," McNealy proclaimed. "People are puzzled, they have the impression there are two versions of Java. This isn't true, there is only one: pure Java." The outbursts came as a legal battle heats up between Sun and Microsoft over the terms of a Java technology licensing agreement.

McNealy told the German crowd his rival has a problem with developers. "Microsoft has already lost more than half a million software developers to Java. If it keeps going this way, they will no longer be able to justify their market value."

He also urged the audience to use Netscape's Internet browser, Navigator in place of Microsoft's Internet Explorer. Writing for the Newsbytes computer news service, reporter Patrick McKenna quotes a Microsoft spokesman as

saying, "We have not heard his remarks, but we really have no comment on anything McNealy might have said."

Ralph Nader Blasts Microsoft

Consumer advocate Ralph Nader has turned his wrath on Microsoft Corp., opening the two-day "Appraising Microsoft and Its Global Strategy" conference in Washington today by critiquing the giant computer software maker. Associated Press writer Scott Sonner predicts, "Speakers are expected to make no bones about their view that Microsoft, with its Windows operating software running 80 percent of personal computers, is getting too big for its britches."

Sonner notes the conference features a panel session entitled "Level Playing Field" and a speech by Scott McNealy, CEO for arch-rival Sun Microsystems, called "No One Should Own the Alphabet." Microsoft itself declined an invitation to be represented at the do, saying it appeared to be a forum for competitors to manipulate public opinion against them.

As a sample of what Microsoft is in for at the gathering, Sonner quotes James Love, director of the Consumer Project on Technology, one of the Nader groups organizing the conference, as saying, "Microsoft has described the criticism in the past as just their competitors complaining and whining. But whenever a company is engaged in monopolistic practices, there are always a lot of dead bodies left on the road. We think it will be helpful to have Ralph and others talk about that and explain how consumers benefit from competition."

Of course, this is just the latest wave of Microsoft bashing. As reported earlier:

- The Justice Department has filed another suit, this time accusing Microsoft of violating a 1995 consent decree barring the company from anti-competitive practices. It seeks fines of $1 million a day and accuses Microsoft of threatening PC makers with terminating their license for Windows if they alter Microsoft’s Internet Explorer software.
- And Senate Judiciary Chairman Orrin Hatch, R-Utah, turned up the heat in Congress last week, saying, "I have not made any secret of the fact that I have serious concerns about Microsoft’s recent efforts to exercise its monopoly power and that I plan to continue to examine the company’s practices."
- The Texas attorney general has accused Microsoft of interfering with a state antitrust investigation, saying a provision in Microsoft’s contracts with computer makers requires those companies to inform Microsoft before providing any information to state and federal investigators.

Microsoft Answers Justice Claims

Microsoft Corp. has filed arguments saying the U.S. Justice Department’s antitrust case should be thrown out of court because it simply is aimed at stalling improvements to Windows software. Responding to the Justice Department’s latest suit, Microsoft says it "retains unfettered freedom" to add new functions to Windows, and that its Internet software product is simply another function, the paper said, quoting Microsoft’s filing.

As reported earlier, the government contends Microsoft is illegally tying the sale of its Internet Explorer software to its dominant Windows 95 program. Writing in The Wall Street Journal this morning, reporter John R. Wilke says the suit "is aimed squarely at preventing Microsoft from including improved features and functionality in upgraded versions of

Windows 95 provided to computer manufacturers." The government's formal response to Microsoft's brief is due in 10 days, and as noted, a hearing is set for Dec. 5. Wilke reports Microsoft also argues:

- The Justice Department is misreading the 1995 decree that settled earlier antitrust charges.
- That in any case, the government knew of its plans to combine the two products even before the two sides negotiated the decree. Yet Justice "did not object to Microsoft's inclusion of Internet-related technologies in Windows 95 until after Microsoft launched the fourth version of Internet Explorer on Sept. 30, literally years after the DOJ was placed on notice of what it now claims is a blatant violation of the consent decree," Microsoft said.
- There is no validity to the government's charge that it tries to muzzle companies through restrictive licensing agreements, which bar customers from disclosing terms, conditions and other elements of their license to use Microsoft software.

Wilke notes, "The government has said the restrictions hinder its investigation and intimidate Microsoft's customers into silence. Despite its objection to this charge, Microsoft disclosed last night that it has 'willingly complied' with the government's requests to disclaim 'any interpretation of its nondisclosure agreements that might interfere with its investigative efforts.'" Microsoft also says the government's contention about the licenses' effect are off-base, adding, "The only person in this country unaware that DOJ is fully receptive to complaints about Microsoft is Rip Van Winkle."

Net Tax Fears Challenged

States and cities are being challenged to back up their claims that Internet tax bills moving through Congress would cut off critical municipal revenues, a White House official says. Speaking with the Reuter News Service, Mickey Ibarra, the president's director of intergovernmental affairs, said, "We are aware of no such disruptions, and we certainly are very interested in hearing from (them) if we missed something here." As reported earlier, a controversial bill to restrict states and localities from imposing new taxes on Internet services has received overwhelmingly approval from a key U.S. Senate committee.

Reuters reporter Vicky Stamas says Ibarra met yesterday with lobbyists from the National Governors' Association, National League of Cities, National Association of Counties (NACo), U.S. Conference of Mayors and others. A NACo subpanel representing 75 of the nation's biggest urban counties also met with Vice President Al Gore on that and other issues. Stamas reports the groups are deeply concerned that their existing tax bases would go untouched, as backers of the Net tax measure asserts. They also fear the bill would put small local businesses, already facing mounting competition from electronic commerce, at a further disadvantage.

Chairman Peter McLaughlin of NACo's large urban counties group, which represents municipalities with a total population of 90 million, said, "We're afraid that the bill being considered by Congress right now would disrupt existing revenue streams, not just prevent our adding (new) taxes." However, said Ibarra, "It's not our attempt to interrupt revenue streams at this point," challenging the groups, which he described as "our partners in government," to review the bill "line-by-line" and pinpoint any sections that would interrupt current revenue streams.

If they find problems, then they should "suggest alternative language," he

said. Saying his office will discuss the groups' concerns with Treasury Department officials that monitor the issue, Ibarra added, "We are interested in sitting down with our officials at Treasury who have a lead on this particular issue to ensure we are very clear about what remaining concerns they have left."

Digital Signature Bill Offered

A bill introduced by two federal lawmakers would require federal agencies to accept computerized personal identification marks known as "digital signatures" as valid signatures on online forms. Aaron Pressman of the Reuter News Service quotes the bill's sponsors, Rep. Anna Eshoo (D-California) and Rep. Billy Tauzin (R-Louisiana), as saying the proposal could generate millions of dollars in cost savings. In a statement, Eshoo adds, "If fully implemented, the legislation could save taxpayers millions of dollars in costs associated with copying, mailing, filing and storing government documents."

Pressman says that under the bill:

- The Office of Management and Budget and the National Telecommunications and Information Administration would have 12 months to establish a way for all federal agencies to put all forms online. Agencies would have two additional years to complete the task.
- Agencies would have to allow citizens to fill out and sign the forms online and allow for electronic payment of any associated fees or other charges.
- Digitally signed government forms would have to be compatible with standards and technology for digital signatures used in the private sector.

Jobs to Announce Apple Changes

Watch next week for Steve Jobs to return to the same theater where he unveiled the Macintosh PC more than a decade ago, this time to disclose major changes to Apple Computer Inc.'s products and how it sells them. The event "is important because it puts the focus back on Apple in a positive light," President Tim Bajarin of Creative Strategies Research International in San Jose, California, tells business writer Catalina Ortiz of The Associated Press. Apple is being tight-lipped about what's on the agenda, saying only that Jobs, co-founder and interim CEO of the Cupertino, California, computer maker, will deliver some "milestone news" about its product line and the way it does business.

Ortiz says industry insiders are speculating Apple may:

- Introduce new Macintosh computers based on the latest PowerPC microprocessor, speedy chips comparable to the competition's. Running at expected speeds of 266 megahertz to 350 MHz, they are comparable to the newest, Pentium II processors from Intel Corp.
- Announce a Web site where customers can buy its products directly. (The company, which currently sells its computers to consumers through retailers, is imitating Dell, Gateway, Micron and other successful direct sellers.)

Discuss plans for low- cost, stripped-down network computers with ally Oracle Corp. Apple is reportedly developing these computers, which lack hard-drives and are intended to make computing cheaper and more ubiquitous.

The Wall Street Journal quoted unidentified sources close to the company as saying Apple may announce Oracle will provide the necessary database software for what will be called the Macintosh NC. Bajarin, a longtime

Apple watcher, says next week's event, hosted at the Flint Center in Cupertino, also highlights the importance of Jobs' role at Apple.

As reported, Jobs, who also runs Pixar Animation Studios, reportedly has said he doesn't want the CEO job permanently. Still, rumors continue that he will play a major role in the company's future. "The fact that Steve is the one doing the conference," says Bajarin, "is significant. Right now, he's the only guy who has the passion to save Apple."

Apple Rolls Out New Power Macs

As predicted over the weekend, Apple Computer Inc. today introduced a new generation of Power Macintosh computers as part of dramatic changes in the way it designs, builds and sells its computers. Reporting from Apple's Cupertino, California, offices, the Reuter News Service says the new systems are called the Power Macintosh G3, based on the fastest available PowerPC processors with increased performance and at a lower cost, starting at around $2,000.

Also today, Apple:

- Launched The Apple Store as part of its new distribution strategy, using the Internet along with existing distributors to sell its products.
- Unveiled a new manufacturing strategy to make systems on a build-to-order basis for The Apple Store customers.
- Introduced a new PowerBook laptop that also includes the more powerful chips.

Apple told reporters its new G3 series has a simplified design to streamline manufacturing so that its computers can be built just in time to exact customer specifications. As reported, analysts are saying the developments are important because they put the focus back on Apple in a positive light.

Reuters notes Apple has been losing market share to other personal computer makers, such as Dell Computer Corp. Apple co-founder Steve Jobs, the firm's interim CEO, commented at today's event, "We're opening things up and giving our customers what they've been asking for. Apple's listening. We're making changes."

Apple Reports $500,000 in Orders

In just the first 12 hours of operation, Apple Computer Inc.'s new online Apple Store reported more than 4.4 million "hits" and the booking of some $500,000 worth of orders. Apple interim CEO Steve Jobs told the Reuter News Service, "We're thrilled by this immediate customer response to our Apple Store and new G3 computers. Apple is really 'thinking different' about the way we do business," he added, referring to the company's "Think Different" advertising campaign.

As reported earlier, Apple this week launched a new line of computers called the Power Macintosh G3, and made some major changes in the way it makes and sells its products, including the addition of an Internet-based store. The Apple Store (http://www.apple.com) "is part of Apple's new distribution strategy to give its customers a greater choice in how they purchase Apple products," Reuters comments.

"The strategy also includes making systems to exact customer specifications and using more common parts, lowering product inventories and manufacturing costs." Analyst Lou Mazzucchelli of Gerard Klauer & Mattison told the wire service, "It's an excellent start. Obviously, there is a lot of pent-up

demand from customers who wanted to buy from Apple this way... I think it's a terrific number. The question is, can they sustain it?"

IBM Unveils Big, New Hard Drive

A hard disk drive with up to eight times more storage capacity than today's units has been developed by IBM, which says the technology will enable PC users to store the equivalent of 16 pickup trucks full of printed information. The Associated Press says the IBM unit also "improves how computers run software featuring video, picture and sound" and "could help reduce PC prices by enabling computers to store the same amount of information more cheaply."

Look for IBM this week to officially unveil the new drives, which have storage capacity of up to 16.8 gigabytes. AP notes today's least expensive PCs, $1,000 and under, now have about 2 gigabytes of space to store data, while PCs above $2,000 hold 6 gigabytes or more. The wire service says IBM managed this by designing a new type of magnetoresistive recording head, which puts digital data onto hard drive discs and are the size of the head of a pin. "The so-called 'Giant Magnetoresistive' heads will be built into PCs starting next month but won't appear in most PCs until early next year," AP adds.

New JTS Hard Drives Offer 6.4 GBytes

Powerful New Desktop Drives Feature Ultra-ATA Interface

SAN JOSE, Calif., Nov. 11 /PRNewswire/ -- JTS Corp. (Amex: JTS), a world leader in the development of hard disk technology, today announced two new additions to its Champion family of hard disk drives for desktop computers. The new Ultra-ATA Champion packs 6.4 Gbytes of storage in a three-disk, 3.5-inch slimline form factor. The offering also includes a two-disk 4.3 Gbyte version.

Featuring a transfer rate of 33 Mbytes/second, rotational speed of 5, 400-rpm, increased cache of 512KB, and average seek time of 11 msec., these new drives are well suited for today's sophisticated desktop PCs. By utilizing MIG heads and Ultra-ATA technology, combined with a partial response-maximum likelihood (PRML) read channel, these drives achieve an excellent value-to-performance ratio.

"JTS continues to solve the challenge of finding innovative ways to bring cost-effective, superior quality, competitive products to market in a timely manner," said Tom Mitchell, president and chief executive officer of JTS Corp. "By leveraging our expertise in MIG technology with today's leading edge advancements like Ultra-ATA, JTS continues to provide the reliable, high-capacity, high-performance, value-class products sought by our customers."

Ultra-ATA drives are capable of transferring data at a rate of up to 33 Mbytes/second, double that of current hard drives. Ultra-ATA is completely backward compatible with existing Fast ATA-2 systems, and improves overall system performance. JTS' unique encapsulation technology locks in quality and protects against handling and electrostatic discharge (ESD) damage. Industry-wide statistics reveal one-third of all units arriving DOA failed due to shock and mishandling.

With JTS technology, drive reliability is significantly improved and the risk of damage during installation is minimized. In addition, the encapsulation reduces ESD resulting in an industry-leading MTBF of 500,000

hours. All JTS hard drives feature a 3-year warranty. Evaluation units and volume production units of the new Champion C6400-3AS and C4300-2AS hard drives will be available in December, 1997. OEM evaluation units of the 6.4 Gbyte and the 4.3 Gbyte are available for $249 and $199, respectively.

New Printing Program Makes Debut

Mindscape Inc. has released PrintMaster Platinum, a high-end version of its PrintMaster Gold Deluxe personal printing program. The Windows-based product offers 92,000 graphics, 20,000 color photos, 4,000 document templates, additional Internet features and new design tools. "This new version reinforces our goal to transform traditional clip art into fine art," says Beckie O'Brien, managing director of Mindscape's print creativity products. "No other full-featured print creativity product can equal the range, graphic quality and sheer number of art and photo pieces available." PrintMaster Platinum is priced at $74.99. A $25 rebate is available. Visit Mindscape on the Web at http://www.mindscape.com.

Multi-Capacity Tape Drives Ship

Iomega Corp. has started shipping its new Ditto Max family of multiple capacity tape backup drives and cartridges. The entry-level Ditto Max drive can back up as much as 7GB of data while the Ditto Max Professional model can back up to a maximum of 10GB. An OmniTray universal cartridge caddy allows the Ditto Max drives to support cartridges of multiple capacities, including 3GB, 5GB, 7GB and 10GB. Also featured is Flash!File storage that offers users 5-second average access of up to 125MB of selected files stored in the cartridge's Flash!File space.

"Iomega has once again raised the bar for tape backup with its new Ditto Max family, combining powerful desktop storage and tape backup in a cost-effective solution," says Fara Yale, director and principal analyst of market research firm Dataquest Inc.'s computer storage service. "Whether customers use their computer for work or at home, the Ditto Max family ... can secure everything on the system's hard disk -- operating systems, applications and files."

The base Ditto Max tape drive is available in external and internal models with prices starting at $199. The Ditto Max Professional tape drive is also available in external and internal versions with prices starting at $299. The estimated street prices for Ditto Max cartridges are: $20 for the 3GB cartridge; $26 for the 5GB cartridge; $30 for the 7GB cartridge; and $35 for the 10GB cartridge.
Visit Iomega on the Web at http://www.iomega.com.

Iomega Unveils Portable Drive

Iomega Corp. has unveiled a new disk drive technology aimed at users of handheld PCs, digital cameras, smart phones and other mobile devices. The company's portable clik! drive uses 40MB removable disks that are about half the size of a credit card. The drive will sell for about $200 and the disks will be priced under $10 each. Shipments are slated to begin in the second half of 1998.

"The potential market impact of clik! drives is significant," says Crawford Del Prete, vice president of IDC's storage research group. "Clik! drives provide a missing piece of the puzzle, opening a whole new array of applications for these products." Iomega has also signed licensing deals with Matsushita Communications Industrial Co. Ltd and Citizen Watch Co.

Ltd. for the manufacturing and marketing of clik! drives. More details are available on Iomega's Web site: http://www.iomega.com.

Zoom Offers Video Camera

Zoom Telephonics Inc. has begun shipping the Zoom/Video Cam, a color, full-motion video camera for Windows 95 PCs. The Zoom/Video Cam is designed for videomail, videophone, videoconferencing and still image capture applications. The $129 unit plugs into a supplied ISA capture card or directly into the video jack on a compatible Zoom modem.

The Zoom/Video Cam features an f1.9 multi-element, anti-reflection coated lens. Focus is adjustable from 2 inches to infinity and the field of view is 50 degrees, enabling users to photograph or show fine detail, an entire room, or a landscape. The camera automatically adjusts for exposure, gain, black level calibration and fluorescent light "flicker." The frame rate is software-selectable for up to 15 frames per second.

The palm-sized Zoom/Video Cam measures 1-7/8 by 3-1/4 by 2-1/2 inches. A weighted base provides stability; the device can also be used with a standard camera tripod. "The Zoom/Video Cam provides the end-user with hardware and software for a wide range of video applications on Windows 95 systems," says Terry Manning, Zoom's vice president of sales and marketing. "Our camera makes an ideal gift. It will be widely available at major retailers."

Infrared Data Association Pavilion Premieres at COMDEX/Fall '97

Hewlett-Packard, IBM, Intel, Nokia Mobile Phones, Sharp Electronics, and Texas Instruments to Showcase Latest IrDA Technology The IrDA Cordless Connectivity Showcase Pavilion will premiere at COMDEX/Fall '97, November 17-21 in Las Vegas. The new pavilion will highlight a variety of devices and applications offering "beamed" infrared (IR) data communications, featuring major hardware, systems, software, peripherals, component and communications manufacturers; cable and telephone companies; and service providers. Attendees at COMDEX/Fall who visit the pavilion will have the opportunity to see the future of connectivity as demonstrated by the interoperation of infrared-enabled devices.

IrDA technology provides globally accepted and market-established cordless data link standards that provide the foundation for cross-platform and cross-brand performance. Today's more than 30 million IrDa-enabled devices, including adapters, printers, handheld organizers and notebook computers, will soon be complemented by millions of digital messaging pagers and digital portable phones. Infrared (IR) communications is based on technology which is similar to the remote control devices such as TV and entertainment remote control devices used in most homes today.

IR offers a convenient, inexpensive and reliable way to connect computer and peripheral devices without the use of cables. IrDA connectivity is being incorporated into most notebook PCs to bring the most cost-effective and easy to use support available for wireless technologies. Internationally, IrDA is featured in product promotions for digital still cameras, mobile phones, pager products, industrial PC's, set-top box offerings, and several LAN access units. Industry leaders, such as IBM, are consistently highlighting the infrared feature in newspaper advertising spots. Pavilion participants, exhibiting the latest IrDA-enabled device, software, solutions and components, include: Hewlett-Packard Company, IBM, Intel, Microsoft Corporation, NEC Systems Laboratories, Niigata Canotec

Co., Nokia Mobile Phones, Phoenix Technologies, Puma Technology, Sharp Electronics, SMSC-Standard Microsystems Corp., Temic Semiconductors, and Texas Instruments.

Microsoft File Not for Everyone

While Microsoft Corp. posted its court filing on the Internet yesterday, those using the Web browser of rival Netscape Communications Corp. initially could not read the documents. Because of a coding problem, only users of Microsoft's own Internet Explorer browser to read the 43-page filing and supporting documents, the Reuter News Service reports. Later, Microsoft spokesman Mark Murray told the wire service the problem was a missing seven-character coding "tag" that inadvertently was dropped by a staff member who worked late Monday to prepare it for posting early yesterday. "It was completely inadvertent," Murray added. "We wanted everyone in the world to see these documents immediately." Reuters says once the problem was discovered and diagnosed, it was fixed in about two hours. Murray told Reuters the staff member who made the coding error was acting as "pinch hitter" for the employee who usually posts such documents to the Internet but was stranded by weather in Montana. As reported, Microsoft argues in the filing that the U.S. Justice Department's antitrust case should be thrown out of court because it simply is aimed at stalling improvements to Windows software. Interested in seeing the filing? Read it elsewhere in this issue or, please visit the web site at http://www.microsoft.com/corpinfo/11-10Filing.html.

Feds OK CompuServe-WorldCom Deal

Federal regulators appear to be satisfied with details of the proposed purchase of CompuServe by WorldCom Inc. for some $1.2 billion in stock. Reporting from Columbus, Ohio, The Associated Press quotes CompuServe and parent company H&R Block Inc. as well as WorldCom as saying the U.S. Department of Justice decided not to seek additional information about the deal, clearing the way for the acquisition to be approved. As noted when the acquisition was announced in September, the companies were required to provide details to the department's Antitrust Division. "The division routinely asks for additional information of companies involved in acquisitions to determine whether deals violate federal antitrust laws," AP says. "Foreign regulators and shareholders, however, still must approve the deal, expected to be concluded early next year." As reported, WorldCom intends to trade CompuServe's consumer online services division and cash to America Online Inc. in exchange for AOL's Internet telecommunications unit. AOL will gain subscribers from CompuServe's flagship online service along with members of Sprynet, CompuServe's Internet-only service.

Net Provider Files Spam Suit

SimpleNet, a San Diego-based Internet presence provider, is suing several local companies and individuals, including VNZ Information and Entertainment Services, seeking an injunction barring unsolicited "spam" e-mail advertisements. The suit, filed in the U.S. Southern District Court in San Diego, is similar to federal civil complaints brought against other alleged spamsters by America Online and CompuServe. But SimpleNet says it will also request the San Diego County District Attorney's Office to investigate the possibility of bringing criminal charges under the California Data Access and Fraud Act.

"Criminal charges are being sought because the named defendants have orchestrated an intricate and highly deceptive plan to defraud SimpleNet and its customers," says Allen R. Cocumelli, SimpleNet's attorney. "In

other Spam cases, the accused defended their right to send these junk e-mails. Our complaint seeks cessation of, and punishment for, acts that were knowingly committed by a group who went to great lengths to avoid prosecution."

In its suit, SimpleNet charges that for more than four months the defendants illegally obtained mailing lists of SimpleNet customers' e-mail addresses and sent thousands of messages -- as many as hundreds of messages per hour -- promoting a book titled "Meet, Attract and Date Gorgeous Women." SimpleNet also alleges that to mask the true origin of the messages, and to evade SimpleNet's technical means of identifying and blocking the incoming spam, the defendants utilized a variety of random user names, domains and IP addresses. Other companies and individuals named in the suit include Far East Mortgage Service, VNZ Services, Son T. Nyuyen, Trouang Nyugen, An Van Nyugen, John Nyugen, Phoi Tran and Thanh Phan. SimpleNet is a provider of Web site hosting, domain hosting and e-mail services. The firm's Web site is located at http://www.simplenet.com.

Study Finds Netizens Happy Bunch

A new study finds Internet users are more optimistic about the future, more concerned about politics and feel more in control of their lives than Americans overall. The findings fly in the face of other recent research that pictures Net surfers as slackers, says the new study's backers, San Francisco-based Wired Ventures and Merrill Lynch Forum. United Press International reports the poll of 1,444 people across the United States found:

- 2 percent of Americans are "superconnected," meaning they exchange email at least three days a week and are regular users of laptop and home computers, beepers or pagers and cellular phones.
- 7 percent are "connected" -- frequent email users who also make regular use of at least some of the other technology the study focused on.
- 62 percent are less frequent users who are still "semiconnected," exchanging email at least once a week and regularly using one of the other "target technologies."
- The remaining 29 percent are "unconnected," not using any of the technologies at all.

The survey, to be released in the December issue of Wired magazine, also learned that 70 percent of those who make active use of the Internet believe they can control change in their lives, while only 52 percent of the general population feels that way. In addition, the poll indicated that "connected" Americans are more politically aware. For instance, says UPI, "When asked to identify the Speaker of the House, 79 percent of the connected correctly identified Newt Gingrich. Only 49 percent of the 'unconnected' came up with his name."

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Microsoft Response to DOJ...

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Petitioner, Supplemental to
Civil Action No. 94-1564

v.

MICROSOFT CORPORATION, Hon. Thomas Penfield Jackson

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION OF THE UNITED STATES FOR AN ORDER TO SHOW CAUSE WHY RESPONDENT MICROSOFT CORPORATION SHOULD NOT BE FOUND IN CIVIL CONTEMPT

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November 10, 1997

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PRELIMINARY STATEMENT

This case involves the interpretation of a

straightforward Consent Decree entered into between Microsoft and the Antitrust Division of the U.S. Department of Justice ("DOJ") on July 15, 1994. That Consent Decree, which is narrowly focused on specific licensing practices, cannot support the DOJ's current efforts to interfere with the design of Microsoft's products.

The DOJ's petition does not address any of the licensing practices that were addressed in the Consent Decree. The petition is instead aimed squarely at preventing Microsoft from including improved features and functionality in upgraded versions of Windows 95 provided to computer manufacturers. Denying consumers the benefit of technologies that have already been developed and tested is perverse. As the DOJ knows, the technologies in question have been a central thrust of Microsoft's operating system development efforts for more than three years. The DOJ should be encouraging Microsoft to dis seminate such new technologies to consumers as quickly and as broadly as possible.

By its express terms, the Consent Decree imposes no restriction on the design of Microsoft's products, including its operating systems. Indeed, even a casual reading of the Con sent Decree makes it abundantly clear that Microsoft retains unfettered freedom to create integrated products like Windows 95 that incorporate a wide range of features and functionality-including those used to access information on the Internet. The history of the negotiations leading up to the Con sent Decree and statements made by the DOJ during the Tunney Act proceeding confirm that the Consent Decree cannot be interpreted to limit Microsoft's ability to decide what is and is not included in the package of software that comprises its operating systems. As a result, the DOJ's position is without merit, and its petition should be dismissed.

SUMMARY OF ARGUMENT

The DOJ's assertion that Microsoft should be held in civil contempt for including the Internet Explorer element in Windows 95 is baseless. Microsoft does not believe it is neces sary for the Court to consider all of the subjects raised in the DOJ's petition because the DOJ's reading of the Consent Decree is implausible on its face. Nevertheless, Microsoft discusses each of those subjects in some detail in this memorandum to assist the Court in understanding why Microsoft regards the DOJ's petition as so wide of the mark. Of course, if the case proceeds to plenary consideration of the DOJ's request to impose contempt sanctions on Microsoft, there are additional facts and legal arguments that Microsoft could and would marshal in its defense if given sufficient time to do so.

The principal points made in this memorandum are the following:

- First, Windows 95 is a "Covered Product" under the Consent Decree, and Internet-related technologies, including Web browsing functionality, were part of the very first version of Windows 95 made available to computer manufacturers in July 1995. As a result, there is no need to reach the question of whether it can otherwise be intelligently said that the Internet Explorer element of Windows 95 has been improperly "tied" to the operating system. Windows 95, including its Internet Explorer element, has always constituted a single "Covered Product" for purposes of the Consent Decree.
- Second, the proviso of Section IV(E)(i) of the Consent Decree expressly states that Microsoft is free to develop

"integrated products." Windows 95 is just such a product, integrating functionality of MS-DOS 6 and Windows 3.1 together with substantial new technology. Even if the DOJ were correct that the Internet Explorer element of Windows 95 can be viewed as a "separate product," the notion that a "separate product" cannot also be part of an "integrated product" represents a false dichotomy. For example, even after their functionality was merged into Windows 95, MS-DOS 6 and Windows 3.1 continued to be offered separately to computer manufacturers.

- Third, the word "integrated" has an unambiguous meaning, i.e., combining separate things, that requires no inquiry into whether those things thereby become inextricably intertwined as a technical matter. In the case of the Internet Explorer elements of Windows 95, there can be no doubt that they are "integrated" with the remainder of the operating system. Internet Explorer has been included in Windows 95 from the outset. Moreover, it does precisely the sorts of things that an operating system does, which is why it is a part of Windows 95.
- Fourth, the circumstances surrounding the formation of the Consent Decree, including documents exchanged between Microsoft and the DOJ and statements made by the DOJ during the Tunney Act proceeding, confirm Microsoft's position that the word "integrated" in the proviso does not have some specialized meaning. Instead, extrinsic evidence confirms that Microsoft is free under the Consent Decree to develop any integrated products, even those that merge the functionality of products also made available separately to computer manufacturers.
- Fifth, the DOJ's suggested criteria for determining whether Internet Explorer is a "separate product" do not speak to the question of whether Internet Explorer is, in the DOJ's words, a "truly integrated" element of Windows 95. (See DOJ Mem. at 19-28.) Even if the DOJ's criteria were not entirely beside the point, they are a recent construction that finds no support in the language of the Consent Decree, the negotiations leading up to the Consent Decree or statements made by the DOJ during the Tunney Act proceeding regarding the proper inter pretation of the Consent Decree. Finally, the DOJ's inherently subjective criteria are invalid because (i) their application would render the proviso of Section IV(E)(i) meaningless, in contravention of basic principles of contract construction, and (ii) they fail to provide explicit guidance about what is and is not proscribed by the Consent Decree, in contravention of basic requirements for injunctive orders.
- Sixth, the DOJ is equitably estopped from objecting to Microsoft's incorporation of Internet-related technologies, including Web browsing functionality, in Windows 95. The DOJ was first on notice of such efforts before the start of negotiations leading up to the Consent Decree. The DOJ did not object to Microsoft's inclusion of Internet-related tech nologies in Windows 95 until after Microsoft launched the fourth version of Internet Explorer on September 30, 1997, literally years after the DOJ was placed on notice of what it now claims is a blatant violation of the Consent Decree.

The DOJ also attacks Microsoft's efforts to preserve the confidentiality of its proprietary information. The con tractual provisions Microsoft uses in this regard are routine in the software industry. More importantly, such non-disclosure agreements are nowhere addressed in the Consent Decree, so they are not a proper subject of a contempt proceeding. In any case, Microsoft has willingly complied with the DOJ's requests to

disclaim any interpretation of its non-disclosure agreements that might interfere with the DOJ's investigative efforts.

Microsoft urges the Court to dismiss the DOJ's petition summarily. If the Court is not inclined to do so at this time, it should put the DOJ to its proof. For the DOJ to succeed, it must prove by "clear and convincing evidence" that Microsoft violated a "clear and unambiguous" prohibition in the Consent Decree. The necessary evidentiary hearing should be preceded by appropriate discovery and motion practice. The DOJ has been investigating Microsoft's inclusion of Internet-related technologies in Windows 95 for more than a year, and Microsoft is entitled under both the Federal Rules of Civil Procedure and basic principles of fair play to full discovery of the evidence that has been gathered by the DOJ. Following such discovery, the parties should be given an opportunity to file motions seeking to limit the issues that need to be addressed at an evidentiary hearing.

Without such discovery and motion practice, Microsoft will be at a serious disadvantage in defending itself against the DOJ's charges. For example, it is entirely unclear what the DOJ is talking about when it demands that Microsoft remove "Internet Explorer" from versions of Windows 95 supplied to computer manufacturers. At times, the DOJ seems to recognize the undesirability of forcing Microsoft to degrade Windows 95 by removing Internet-related technologies that are relied on by various third-party software developers. This may be why the DOJ asks that Microsoft be required to provide registered users of Windows 95 with instructions on how to remove the Internet Explorer icon from the Windows 95 desktop (one way to access Web browsing functionality) as opposed to removing all of the constituent parts of Internet Explorer from the operating sys tem. (See DOJ Pet. at 19.) At other times, however, the DOJ challenges Microsoft's inclusion of any Internet-related technologies in Windows 95. (See DOJ. Mem. at 2-3.)

Such fundamental uncertainty in a case in which the DOJ seeks to impose severe contempt sanctions is inexcusable. Microsoft is entitled to know precisely which of the more than 100 files that comprise the Internet Explorer element of Windows 95 the DOJ wants Microsoft to remove from the operating system.

STATEMENT OF FACTS

The DOJ's statement of facts is in many instances highly selective and misleading. In other instances, the DOJ's factual assertions are simply wrong. The extent to which the DOJ misstates basic facts regarding the negotiations leading up to the Consent Decree and the relationship of the Internet Explorer element of Windows 95 to the remainder of the oper ating system is remarkable given the stridency of the DOJ's position. Regrettably, Microsoft was never asked to address these important issues during the DOJ's extensive investigation. If it had been, some of the misunderstandings reflected in the DOJ's papers might have been averted. As it is, the DOJ appears to be relying primarily on the uninformed speculation of witnesses with no first-hand knowledge of the facts.1

A. Inclusion of Internet-Related Technologies in Windows 95

From early on, Microsoft planned to include various Internet-related technologies in Windows 95, which was code-named "Chicago" during its development. (Declaration of Steven Sinofsky, dated Nov. 8, 1997 ("Sinofsky Decl."), 2.) In fact,

Microsoft began work on some of the technologies eventually included in Internet Explorer in 1993. (Sinofsky Decl. 2.) This work began long before Netscape, the beneficiary of the DOJ's petition, was founded in April 1994, and thus the work could not have been motivated by any desire to injure Netscape. (Sinofsky Decl. 11-12.)

The DOJ became aware of Microsoft's plans to include Internet-related features in Windows 95 when it subpoenaed large numbers of documents from Microsoft in late 1993 and early 1994. (Declaration of Lynn Radliff, dated Nov. 8, 1997, 3.) These documents detailed Microsoft's plans to make Internet-related technologies an integral part of Chicago (Sinofsky Decl. 2, 4, 5, 7, 10)-undermining the DOJ's contention that the inclusion of such technologies in Windows 95 is a recent effort by Microsoft to "label or package Internet Explorer for strategic or legal advantage" (DOJ Mem. at 19). In particular, the documents show that before Microsoft even knew of Netscape's existence, it was planning to include "Integrated Net Browsing" in Windows 95 in the form of an "FTP/Gopher/Web unified client." (Sinofsky Decl. 10, 12.) That is precisely the type of Web browsing functionality included in the first version of Internet Explorer. (Declaration of David Cole, dated Nov. 8, 1997 ("Cole Decl."), 39.) Even if the DOJ attempts to claim it did not know what was contained in the documents it subpoenaed from Microsoft, the DOJ cannot deny that Microsoft publicly discussed its plans to include Internet-related technologies in Chicago beginning in the spring of 1994. (Sinofsky Decl. 8,9.) One way or another, the DOJ was on notice more than three years ago that Microsoft intended to make Windows 95 itself a vehicle for accessing information on the Internet.

On the heels of Microsoft's entry into the Consent Decree in July 1994, the DOJ began a wide-ranging investigation of Microsoft's proposed acquisition of Intuit, a leading developer of personal finance software (the acquisition was never completed). (Affidavit of Steven L. Holley, sworn to Nov. 9, 1997 ("Holley Aff."), 3.) In the course of that investigation, the DOJ demanded extensive information about virtually every aspect of Microsoft's business. (Holley Aff. 4 3.) As a result, the DOJ remained fully apprised through the commercial release of Windows 95 in August 1995 that Microsoft was developing an element of Chicago (then code-named "O'Hare") that included numerous Internet-related technologies, including basic Web browsing functionality. (Holley Aff. 3.)

Given the rapidly increasing popularity of the Internet, Microsoft moved forward with O'Hare as quickly as possible to finish it in time for the commercial release of Windows 95. (Declaration of Brad Chase, dated Nov. 9, 1997 ("Chase Decl.") 2, 12.) The group of technologies developed under the O'Hare umbrella was ultimately given the name Internet Explorer. (Sinofsky Decl. 16.) Internet Explorer was an element of the first version of Windows 95 made available to computer manufacturers. (Chase Decl. 17-19.)

Internet Explorer is one of several elements of Windows 95 that had Chicago-related code names during the development stage. Another example is Exchange, the universal electronic mail client in Windows 95, which was code-named "Capone." Despite what the DOJ says (see DOJ Mem. at 25-26), other elements of Windows 95 also have names and are promoted to some extent separately from the remainder of the operating

system (Chase Decl. 17-19).

Contrary to the DOJ's earnest (but inaccurate) representations (see DOJ Mem. at 8), the two most recent versions of Internet Explorer-IE3.0 and IE4.0-are not simply applications that sit on top of Windows 95. They are instead integral elements of the operating system that provide a variety of important operating system services. (Cole Decl. 5, 46-48, 55.)

One of the most important functions of any operating system is to provide access to information stores, whether those information stores are local-such as hard disk drives, floppy disk drives, tape backup drives or CD-ROM drives-or remote-such as servers on local and wide area networks. (Cole Decl. 3, 13-15.) Of course, the Internet is a very large information store that resides on a global public network. (Cole Decl. 14.) As a result, it makes perfect sense for an operating system like Windows 95 to provide access to the Internet so that the wealth of information on the Internet is available to all applications running on top of the operating system. (Cole Decl. 4-5, 38-39; Declaration of Tim Krauskopf, dated Nov. 8, 1997 ("Krauskopf Decl."), 7-8; Declaration of Mazin Ramadan, dated Nov. 9, 1997 ("Ramadan Decl."), 5.) Providing such access is just the latest step in the evolution of operating systems to keep pace with the changing nature of personal computing, which explains why virtually all modern operating systems include a variety of Internet-related technologies. (Cole Decl. 15, 35-40.)

In addition, the Internet Explorer element of Windows 95 provides hundreds of application programming interfaces ("APIs") that are used by Microsoft and third-party software developers. (See DOJ Mem. at 9 n.4; Cole Decl. 29; Chase Decl. 7; Krauskopf Decl. 5-6, 9-10; Declaration of Mike Devlin, dated Nov. 8, 1997 (Devlin Decl."), 3-6; Declaration of J.J. Allaire, dated Nov. 7, 1997 ("Allaire Decl."), 6-8; Declaration of Jesse Boudreau, dated Nov. 8, 1997 ("Boudreau Decl."), 3-4, 6; Ramadan Decl. 3-5, 7.) Those APIs permit applications to obtain various operating system services. (Cole Decl. 47; Krauskopf Decl. 9; Devlin Decl. 3; Allaire Decl. 6; Boudreau Decl. 3; Ramadan 4.) If the Internet Explorer element is removed from Windows 95, other portions of the operating system that depend on the functions it provides will break. (Cole Decl. 7, 51, 62, 84, 92-93.) For example, the software used by millions of Americans to gain access to the Internet via America Online, CompuServe and MSN all relies on Internet Explorer and thus will break if Internet Explorer is removed from Windows 95. (Cole Decl. 51, 62, 65, 72, 77, 90.) The DOJ asks the Court selectively to ignore "certain software files or APIs" that are part of IE3.0 and IE4.0 (see DOJ Mem. at 19), but those software files and APIs comprise the lion's share of Internet Explorer (Cole Decl. 29, 46-48, 57).

The DOJ's is just wrong when it asserts (without factual foundation) that the Internet Explorer element of Windows 95 could easily be removed without impairing the remainder of the operating system. (See DOJ Mem. at 27.) If Internet Explorer is removed, Windows 95 will not function as intended. (Cole Decl. 7, 51, 55, 92-93.)

The DOJ complains that Microsoft requires computer manufacturers to ship Windows 95 "as sent by Microsoft." (DOJ Pet. 19.) That complaint is misguided. One reason for the

enormous success of Intel-based personal computers has been the availability of an operating system that runs on machines from a large number of computer manufacturers and that supports a wide range of software products. (Chase Decl. 25; Cole Decl. 29-30.) Permitting the hundreds of computer manufacturers around the world who license Windows 95 to decide for them selves what parts of the operating system they will and will not ship would destroy the benefits of that common platform. (Chase Decl. 22.) If that happened, third-party software developers could not know whether code that performs functions associated with particular APIs in the operating system would be present on any given computer. (Chase Decl. 22; Krauskopf Decl. 5.) Microsoft avoids problems associated with such balkanization by requiring computer manufacturers-who serve as the principal distributors of Microsoft's technology-to ship Windows 95 the way it was designed. (Chase Decl. 22; Cole Decl. 30.) If Microsoft did not take such steps, its reputation as a supplier of quality software would suffer, and customer support costs would increase. (Chase Decl. 22.)

Microsoft imposes no constraint on the ability of computer manufacturers to preinstall Netscape Navigator or any other browser software on their machines. (Chase Decl. 29.) Moreover, the fact that the Internet Explorer element of Windows 95 includes web browsing functionality does not diminish the willingness of computer manufacturers to include web browsing software from Netscape or other vendors on their machines. (Declaration of William Morris, dated Nov. 7, 1997 ("Morris Decl."), 6; Declaration of Mel Ransom, dated Nov. 6, 1997 ("Ransom Decl."), 8; Declaration of John T. Rose, dated Nov. 9, 1997 ("Rose Decl."), 8.)

Nor does Microsoft impose any constraint on end users' ability to customize Windows 95 to suit their particular preferences. End users can delete whatever portions of the operating system they choose-although they obviously run the risk of deleting something that will break either the operating system itself or applications designed to run on top of the operating system. (Cole Decl. 7, 51, 92-93.) In addition, end users are free to use whatever software products they choose with Windows 95, including Netscape Navigator or any other browser software. Microsoft has done nothing to prevent third-party software developers from creating such products. (Chase Decl. 29-31.) To the contrary, Microsoft spends tens of millions of dollars each year encouraging third-party software developers to create products that are compatible with Windows 95, including products that take advantage of operating system services provided by the Internet Explorer element of the operating system. (Chase Decl. 7.) In sum, Microsoft's refusal to permit computer manufacturers to delete the Internet Explorer element of Windows 95 does not prevent other software vendors from distributing their products through computer manufacturers or prevent end users from using such products.

B. Negotiations Leading up to the Consent Decree

The focus of the DOJ's investigation of Microsoft that began in August 1993 was the contracts pursuant to which Microsoft licensed its MS-DOS 6 and Windows 3.1 operating systems to computer manufacturers. (Affidavit of Richard J. Urowsky, sworn to Nov. 10, 1997 ("Urowsky Aff."), 2.) At a late stage of the investigation, the DOJ also raised certain non-disclosure agreements between Microsoft and third-party software developers as an auxiliary issue. (Urowsky Aff. 5.)

During the Tunney Act proceeding, the DOJ candidly acknowledged that Microsoft's licensing practices had at most a "minor," "immaterial" and "unquantifiable" effect on Microsoft's success in licensing MS-DOS 6 and Windows 3.1 to computer manufacturers before July 1994. (Affidavit of Andrew C. Hruska, sworn to Nov. 9, 1997 ("Hruska Aff."), Ex. A.) Instead, the DOJ professed to be concerned about the future effect of such licensing practices on competition. (Hruska Aff. Ex. A.) Given that Microsoft never regarded the challenged practices as respon sible for the popularity of its operating systems, it agreed to abandon those practices to resolve the DOJ investigation and a simultaneous investigation being conducted by Directorate-General IV ("DG IV"), the competition authority of the European Union in Brussels.

The only issue regarding product design that arose during the DOJ investigation was Microsoft's inclusion of various third-party utilities in MS-DOS 6. The DOJ raised that issue early on but did not pursue it after Microsoft stated its legal position on so-called "technological tying." (Holley Aff. 2.) What Microsoft told the DOJ is that the law permits Microsoft to make whatever changes it deems appropriate to its operating systems as long as those changes are not intended solely to injure competitors by rendering their products incom patible. (Holley Aff. 2.) This standard-which comes straight out the decided cases on the subject (see page 17 n.6, infra)-makes it extremely difficult to challenge a software vendor's product design decisions under the antitrust laws.

The initial settlement proposal made by the DOJ on June 21, 1994 was presented to Microsoft as being comprehen sive. (Urowsky Aff. 3-5.) Notably, it made no mention of tying claims, either based on alleged past conduct or as a basis of future concern. (Urowsky Aff. 7.) That is consistent with the fact that tying was never really an issue in the DOJ investigation.

The practices challenged in the DOJ's complaint were instead the duration of Microsoft's license agreements with computer manufacturers (Compl. 23-24), the availability of a per processor licensing option (Compl. 21-22) and the need for computer manufacturers to make minimum commitments to obtain volume discounts (Compl. 23). In addition, the DOJ challenged certain non-disclosure agreements with third-party software developers on the theory that those agreements might inhibit the creation of software products compatible with non-Microsoft operating systems. (Compl. 29-34.) There is no reference in the DOJ's complaint to tying. As the DOJ stated during the Tunney Act proceeding, there is no reference to tying in the complaint because there was no evidentiary basis for asserting such a claim. (Hruska Aff. Ex. B at 16).2 As the Assistant Attorney General said at the time, she would gladly have sued Microsoft on any potential theory, but the DOJ had no factual support for claims other than those included in the complaint.3

Windows 95, a replacement for both MS-DOS and Windows that incorporates functionality previously provided by both products, was well along in the development process when the negotiations leading up to the Consent Decree began. (Urowsky Aff. 22.) In fact, Windows 95 is a "Covered Product" identified by its code name, Chicago, in the Consent Decree. (Consent Decree II(1)(v).) The DOJ knew long before Windows 95 was commercially released-which did not happen until a full

year after Microsoft entered into the Consent Decree-that the new operating system merged the functionality of MS-DOS 6 and Windows 3.1. (Urowsky Aff. 22.) Yet, the DOJ never challenged Windows 95 as a violation of Section IV(E)(i).

C. Genesis of Section IV(E)(i)

Whatever the DOJ may now say, the concern about tying that led to the inclusion of Section IV(E)(i) in the Consent Decree came from DG IV, not the DOJ. That is a reflection of the fact that the Consent Decree was the product of unusual three-way negotiations among Microsoft, the DOJ and DG IV, a fact the DOJ neglects to mention.

In a complaint filed with DG IV in June 1993, one of Microsoft's fiercest competitors, Novell, alleged that Microsoft tied MS-DOS 6 and Windows 3.1 together in an effort to foreclose competition from Novell's operating system called DR DOS, a poor clone of MS-DOS. (Urowsky Aff. 8-9.) Although Novell's allegation was unsupported by the facts, it was parroted by DG IV in a draft Statement of Objections provided to Microsoft on June 30, 1994. (Urowsky Aff. 17 & Ex. C.) As is plain from that document, the concern was not that Microsoft was incorporating new features and functionality into its operating systems. Instead, the concern was that Microsoft had "economically tied" two free-standing products, each of which allegedly dominated a separate "product market" for antitrust purposes. (Urowsky Aff. 17 & Ex. C at 18-28, 34.)

On July 3, 1994 in Brussels, the DOJ and DG IV jointly provided Microsoft with various "points of concern." (Urowsky Aff. 18 & Ex. D.) Among those points of concern was the notion that Microsoft had conditioned its willingness to license Windows 3.1 on a computer manufacturer's agreement to license MS-DOS 6 as well. (Urowsky Aff. 19.) This was an allegation that had been made by Novell in its complaint to DG IV, although the allegation that Microsoft engaged in such express conditioning was not contained in the draft Statement of Objections supplied to Microsoft by DG IV. (Urowsky Aff. 9, 17.)

On July 4, 1994, Microsoft provided the DOJ and DG IV with its initial response to the points of concern. (Urowsky Aff. 20 & Ex. E.) In that response, Microsoft stated that it would continue its existing policy of not licensing one product on the condition that a computer manufacturer also agree to license a separate stand-alone product. Microsoft, however, specifically reserved its right to continue developing integrated products like Chicago, i.e., a product that merged the functionality of the very two products that DG IV had accused Microsoft of tying together economically. (Urowsky Aff. 20.)

Throughout the balance of the three-way negotiations leading up to the Consent Decree, Microsoft strictly adhered to its opening position that it would accept no government inter ference in the design of its operating systems. In other words, the issue of product design was off the table from the outset of the negotiations. Neither the DOJ nor DG IV ever challenged this position.

D. Drafting History of the Proviso

The proviso was drafted by Microsoft's counsel on the express instructions of their client. (Urowsky Aff. 28-30.) It was imperative to Microsoft that it retain the unfettered right to incorporate new features into its operating systems, even if-as in the case of Chicago and other Microsoft operating

systems-some of those features are available as free-standing products.

Microsoft first presented the proviso to the DOJ on July 14, 1994 to make explicit what had been common ground from the beginning of the negotiations, namely, that the prohibition in Section IV(E)(i) on direct or indirect conditioning did not prevent Microsoft from developing integrated products. (Urowsky Aff. 31.) The meaning of the term "integrated" is illuminated by Chicago itself, a new operating system that merged the functionality of MS-DOS 6 and Windows 3.1, both of which had been (and continued to be) made available separately to com puter manufacturers.

The DOJ and DG IV requested an amendment to the proviso to make it clear that although Section IV(E)(i) imposed no limitations on Microsoft's product design decisions, it did not authorize Microsoft to do things it otherwise would be prohibited from doing under the Sherman Act or the Treaty of Rome. (Urowsky Aff. 34, 36.) With that minor amendment, how ever, the DOJ and DG IV both accepted the fundamental premise of the proviso, namely, that Section IV(E)(i) itself poses no obstacle to Microsoft's development of integrated products. Until this case, neither the DOJ nor DG IV has ever challenged that understanding.

E. Tunney Act Proceeding

As noted above, during the Tunney Act proceeding, Micro System Options, the developer of a three-dimensional graphics tool, complained about Microsoft's inclusion of a similar tool in Windows NT 3.5. See Department of Justice, Response of the United States to Public Comments Concerning the Proposed Final Judgment, 59 Fed. Reg. 59,426, 59,428 (1994). Microsoft had licensed the tool at issue from Silicon Graphics several years previously. Silicon Graphics, however, continued to make the tool available separately and to license it to other operating system vendors, in competition with both Microsoft and Micro System Options.

In responding to the public comment, the DOJ took a position that is completely at odds with its position in this case.

- First, the DOJ noted that its complaint did "not challenge as violations of the antitrust laws Microsoft's inclusion of new software features in its operating system products."
- Second, the DOJ stated that Microsoft's inclusion of new features in its operating systems "reduces the demand for software products sold by third parties as a complement to the Microsoft product that performed similar functions."
- Third, the DOJ admitted that the proviso limits the application of Section IV(E)(i) because the "evidence developed by the government during its investigation would not, in its view, support a broader injunction." Indeed, the DOJ declared without qualification that a broad injunction against Microsoft's inclusion of new features in its operating systems "generally would not be consistent with the public interest."

ARGUMENT

For Microsoft to be held in civil contempt, the DOJ must prove by "clear and convincing evidence" that Microsoft violated a "clear and unambiguous" prohibition in the Consent Decree. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (internal quotation marks omitted). Because the DOJ has no hope of making such a showing, this Court should deny the DOJ's petition for an order to show

cause.

To the extent the Court determines that further proceedings are necessary, the Court should adopt a schedule that gives Microsoft the opportunity to conduct appropriate dis covery in advance of a full evidentiary hearing on the merits of the DOJ's claims. Contempt sanctions cannot be imposed based on affidavits and deposition testimony that have never been subjected to cross-examination.4 Nor are there exigent circum stances that warrant a departure from established rules of procedure. See Fed. R. Civ. P. 43(a). There are instead impor tant reasons to refrain from taking precipitate action. The forced removal of Internet-related technologies from Windows 95 will be detrimental to the interests of numerous third parties who rely on those technologies. The DOJ has made no showing sufficient to justify the infliction of such injury.

I. The DOJ's Insistence That Microsoft Is a Monopolist Is Predicated on Nothing More than the DOJ's Unproved Allegations.

In seeking to portray Microsoft as a monopolist, the DOJ's papers proceed from the assumption that the DOJ has already proved (i) the existence of a "product market" restricted to operating systems for Intel-compatible personal computers and (ii) that Microsoft exercises monopoly power in such a "market." In fact, the DOJ has never established either proposition. Microsoft denied all material allegations of the DOJ's complaint, and there has never been a judicial finding to the contrary. See United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995).

The DOJ itself acknowledges that Microsoft operating systems face stiff competition from products such as Netscape's Web browsing software and Java virtual machines that run on a variety of different microprocessors. (See DOJ Mem. at 31-33.) There is thus no basis to limit the relevant "product market" to operating systems that run on Intel-compatible microprocessors. Furthermore, Microsoft does not behave like a monopolist shielded from competition. Instead, Microsoft is constantly improving the features and functionality of its operating systems while continuing to offer them to consumers at attractive prices. (Cole Decl. 31-33; Chase Decl. 3.)

Windows 95 is unquestionably popular with consumers, but that does not establish that Microsoft wields monopoly power. Moreover, the DOJ's evidence provides no support for the assertion that Microsoft forces computer manufacturers to license Windows 95. Rather, as demand driven enterprises, computer manufacturers pre-install Windows 95 on their machines because that is what their customers want-millions of them, making individual purchase decisions. (Morris Decl. 2-3; Ransom Decl. 2-3; Rose Decl. 3-4.)5 There is nothing illegal about having an extremely successful product.

As a matter of legal analysis, monopoly power refers to the unilateral ability to reduce output and increase prices. See Eastman Kodak Co. v. Image Technical Svcs., Inc., 504 U.S. 451, 485 (1992). Microsoft has no such ability because it has no control over scarce productive resources. Microsoft's assets consist of intellectual property generated by smart people, and there is no shortage of either in this country (or elsewhere around the world). That is why Microsoft continually invests large sums of money to improve its products to hold its own in the fiercely competitive software industry.

The central fact to bear in mind is that Microsoft does nothing to prevent other companies from developing superior alternatives to Windows 95. As yet, nobody has succeeded in displacing Windows 95 in the hearts and minds of consumers, but that does not mean that large and powerful companies like IBM, Netscape, Oracle and Sun Microsystems are not trying to achieve exactly that result. The Consent Decree imposes no restraint on Microsoft in responding to such competitive challenges. The DOJ should resist the temptation to bring the blessings of regulation to the most successful industry in America.

II. Microsoft Has Not Violated Section IV(E)(i) of the Consent Decree.

The DOJ's petition and supporting memorandum are long on rhetoric and short on analysis. To support its position that Section IV(E)(i) of the Consent Decree prohibits Microsoft from incorporating Internet-related technologies into Windows 95, the DOJ seeks to relegate the proviso of Section IV(E)(i) to the status of meaningless surplusage. In fact, the DOJ never offers any indication of what it thinks the term "integrated products" in the proviso means.

The DOJ's position is neither intellectually nor legally defensible. As the DOJ itself observes, Windows 95 is a "package of software that Microsoft chooses to include and ship together labelled as 'Windows 95.'" (DOJ Mem. at 15.) That observation is absolutely correct. In insisting on the addition of the proviso of Section IV(E)(i), Microsoft insured that it would retain the unfettered freedom under the Consent Decree to decide what is included in that "package of software."6 It is as simple as that.

A. The Court Need Not Reach Section IV(E)(i) Because Internet Explorer Has Been an Element of a "Covered Product" under the Consent Decree from the Outset.

The Court should deny the DOJ's petition without ever reaching Section IV(E)(i) of the Consent Decree. That is so because Internet Explorer was an element of the very first version of Windows 95 made available to computer manufacturers in July 1995. As the DOJ admits in its petition, "Windows 95 is the commercial implementation of the product formerly code-named 'Chicago,' a 'Covered Product' as defined by Section II(1) of the [Consent Decree]." (DOJ Pet. 18; accord DOJ Mem. at 13 n.6.) As a result, Internet Explorer and the other elements of Windows 95 constitute a "Covered Product" under the Consent Decree, and there is no basis for the DOJ to maintain that Section IV(E)(i)'s prohibition against the "tying" of standalone products comes into play. The Consent Decree does not prohibit Microsoft from licensing a single "Covered Product" to computer manufacturers.

It can come as no surprise to the DOJ that Internet Explorer is an element of a "Covered Product" under the Consent Decree. The DOJ was on notice long before the negotiations leading up to the Consent Decree began that Windows 95 (code-named "Chicago") would include a range of Internet-related technologies, including Web browsing functionality. (See Sinofsky Decl. 2, 4, 5, 7-10.) The first version of Internet Explorer was code-named "O'Hare," i.e., a point of embarkation to other places and a critical aspect of Chicago. (Sinofsky Decl. 14.) Prior to July 1994, Microsoft produced to the DOJ

a number of documents revealing Microsoft's intention to make Internet-related technologies, including Web browsing functionality, an integral part of Windows 95. (Sinofsky Decl. 2, 4, 5, 7, 10.) If those documents were insufficient to put the DOJ on notice, Microsoft also publicly disclosed-months before the Consent Decree was negotiated-its plans to include Web browsing functionality in Chicago. (Sinofsky Decl. 8-9.)

Windows 95 as supplied to computer manufacturers has always included Internet Explorer. (Chase Decl. 2.) It thus is not open for the DOJ to argue that Internet Explorer was a "separate product" originally made available separately to computer manufacturers that is now being improperly "tied" to Windows 95. The simple fact is that Microsoft never supplied Windows 95 to computer manufacturers in the disintegrated or stripped down form the DOJ now wants Microsoft to create. (Chase Decl. 2, 12.)

B. There Is No Reason Why a "Separate Product" Cannot Also Be an Element of an "Integrated Product" under the Proviso of Section IV(E)(i).

If this Court deems it necessary to reach Section IV(E)(i), the proviso of that section makes it evident that the Consent Decree does not prohibit Microsoft from "developing integrated products" such as Windows 95. If Microsoft did not have that ability, then the proviso would be rendered meaning less, effecting a substantial and unjustified modification of the Consent Decree.

The "construction of a consent decree is essentially a matter of contract law." Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1125 (D.C. Cir. 1983), cert. denied, 467 U.S. 1219 (1984). Thus, as the DOJ admits, in interpreting the Consent Decree, the Court must look first to its plain lan guage. (See DOJ Mem. at 11.) As the Supreme Court has explained:

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the con ditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 682 (1971) (emphasis added). To the extent that terms used in the Consent Decree are unambiguous, its scope "must be discerned within its four corners." Id.

The DOJ attempts to avoid the clear import of the proviso of Section IV(E)(i) by drawing an artificial distinction between the terms "other product" and "integrated products." According to the DOJ, "Internet Explorer is a separate or 'other' product from the Windows 95 operating system, and not 'integrated' with it, for purposes of Sec tion IV(E)(i)." (DOJ Mem. at 19.) The distinction the DOJ seeks to draw is specious. The reference to "other product" in Section IV(E)(i) does not stand in contrast to "integrated products." Instead, it is meant to encompass products other than a "Covered Product" or an "Operating System Software" product, both of which are defined terms in the Consent Decree. This does not mean, however, that a "Covered Product,"

"Operating System Software" product or "other product" cannot also be elements of an "integrated product" under the proviso. In fact, Windows 95 represented exactly such a merger of the functionality of two "Covered Products," i.e., MS-DOS 6 and Windows 3.1, and was never conceived by Microsoft as a "separate product" devoid of Internet-related technologies.

At bottom, the DOJ maintains that if a particular feature has ever had what might be characterized as a separate existence, it cannot be an element of an "integrated product" under Section IV(E)(i). (See DOJ Mem. at 21-22.) The Consent Decree, however, must be interpreted to give effect to all of its provisions. See United States v. Western Elec. Co., 12 F.3d 225, 232-33 (D.C. Cir. 1993) (rejecting interpretation of one provision of consent decree that would have "render[ed] inoperative" a related provision). If the DOJ's crabbed reading of Section IV(E)(i) were correct, the proviso would be rendered meaningless. As the DOJ knew at the time it entered into the Consent Decree, virtually every new feature that has been incor porated into Microsoft's operating systems over the last 16 years was at one time available separately, either from Microsoft or from another software vendor. (Chase Decl. 21.) And in many cases, third-party software developers continue to develop and market products that perform functions similar to those performed by elements of Windows 95. (Chase Decl. 21.) Disk compression and defragmentation utilities are just two examples of such products.

As noted above, Windows 95 itself proves that the DOJ's interpretation of Section IV(E)(i) cannot possibly be correct. Windows 95 integrated the functionality of both MS-DOS 6 and Windows 3.1 in an innovative new operating system. Before Microsoft developed Windows 95, Microsoft made MS-DOS 6 and Windows 3.1 separately available to computer manufacturers, and continued to do so even after Windows 95 was commercially released. Despite the separate availability of MS-DOS 6 and Windows 3.1-which cannot be disputed-the DOJ never contended that Section IV(E)(i) of the Consent Decree (or the general law of tying for that matter) prohibited Microsoft from including the functionality of the two products in Windows 95. As the Court of Appeals has recognized, "ex post constructions" such as the one offered by the DOJ "are not probative of the meaning of a consent decree." United States v. Western Elec. Co., 894 F.2d 1387, 1393 (D.C. Cir. 1990).

C. The DOJ's Position Is Flatly Inconsistent with the Ordinary Meaning of the Word "Integrated."

The proviso of Section IV(E)(i) expressly states that nothing in that section shall "be construed to prohibit Microsoft from developing integrated products." Because the DOJ's entire case is predicated on the logical fallacy that the concepts of "separate product" and "integrated product" are mutually exclusive, the DOJ never addresses the meaning of the word "integrated" in the proviso. As a result, the DOJ makes no showing that the word "integrated" means something other than its common dictionary definition.

In everyday English, the word "integrated" means "combined," "united" or "incorporated into." Webster's Third New International Dictionary 1174 (1965). Accordingly, an "integrated product" is one like Windows 95 that consists of a wide range of features and functions that-although they may also be available separately-have been "combined" or "united"

together. There is thus no requirement that elements of an "integrated product" be inextricably intertwined. It is therefore true that the freedom reserved to Microsoft under the proviso of Section IV(E)(i) to design its products however it sees fit gives Microsoft complete latitude in incorporating new features and functionality into its operating systems, but that is in the nature of a proviso.

In improving the Internet-related technologies in Windows 95, Microsoft could have decided to isolate Web browsing functionality in a self-contained application, similar to the approach Netscape has taken. That is not the course Microsoft chose. Rather, Microsoft engineered IE3.0 and IE4.0 as a set of core operating system services. (Cole Decl. 45-46.) In other words, IE3.0 and IE4.0 replace and extend existing elements of Windows 95. (Cole Decl. 5.) In Microsoft's view, that is the most promising approach to providing users with seamless access to information stored on the Internet, thereby advancing Microsoft's vision of "Information at Your Fingertips." (Cole Decl. 34.)

Operating system services provided by Internet Explorer extend far beyond merely allowing users to look at content stored on the Internet. That is rudimentary functionality provided by Web browsing software from Netscape and a number of other software vendors. Instead, IE3.0 and IE4.0 provide a wide range of functionality that does not necessarily relate in any way to the narrow concept of Web browsing. (Cole Decl. 47; Declaration of Joe Belfiore, dated Nov. 9, 1997, 6-16.) For example, the latest version of Intuit's personal finance software product, Quicken, displays locally-stored financial tables in a special document format called Hypertext Markup Language ("HTML") using operating system services provided by Internet Explorer. (Cole Decl. 67.) In addition, other portions of Windows 95 itself call upon operating system services provided by IE3.0 and IE4.0, and Windows 95 will not function properly without those elements. (Cole Decl. 55, 84, 93.)

Unlike Netscape's Web browsing software, the updated Internet Explorer element of Windows 95 is "componentized." (Krauskopf Decl. 9-10.) In plain English, this means that third-party software developers can essentially incorporate components of Internet Explorer into their products, thereby eliminating the need to write additional code that performs functions already performed by the operating system. (Cole Decl. 49.) For example, Symantec, the leading developer of utilities for Windows 95, uses a component of IE3.0 and IE4.0 in its Norton Utilities product to enable users to obtain updates via online connections. (Cole Decl. 60.) Such functionality is important for products like anti-virus utilities that must be constantly upgraded to keep pace with the boundless imaginations of computer hackers. Although the DOJ chooses to ignore the point, a large (and growing) number of third-party software products depend upon components of Internet Explorer. (Allaire Decl. 6-8; Devlin Decl. 5-6; Boudreau Decl. 3-4, 6; Ramadan Decl. 3-5, 7.)

Microsoft continues to believe that questions regarding the technical merit of its product design decisions are not justiciable. Nevertheless, as is plain from the foregoing discussion, and as explained in great detail in declarations accompanying this memorandum, Internet Explorer is very tightly integrated with the remainder of the operating

system. That is so even if-contrary to the plain meaning of the word "integrated" and the parties' intentions as disclosed in negotiating history of the Consent Decree (discussed below)-the concept of integration in the proviso of Section IV(E)(i) requires something more than the simple combination of separate things.

D. The Circumstances Surrounding Formation of the Consent Decree Confirm That the Language of the Proviso Should Be Given Its Everyday Meaning.

If the Court determines that it must look beyond the plain language of Section IV(E)(i), the history of the negotiations leading up to the Consent Decree confirm that the proviso should be interpreted in accordance with its normal everyday meaning. What is more, to the extent that any ambiguities remain after considering such extrinsic evidence, the Court must resolve those ambiguities in favor of Microsoft, the party charged with contempt. See Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 927-28 (D.C. Cir. 1982); see also Harris v. City of Philadelphia, 47 F.3d 1342, 1350 (3d Cir. 1995); NBA Properties, Inc. v. Gold, 895 F.2d 30, 32 (1st Cir. 1990); Ford v. Kammerer, 450 F.2d 279, 280 (3d Cir. 1971).

The DOJ acknowledges that the Court "may also read decree terms by reference to the circumstances and purpose surrounding the formation of the decree and by any technical meaning words used may have had to the parties." (DOJ Mem. at 11-12.) At the October 27, 1997 scheduling conference, however, the DOJ suggested that the Court's consideration of such extrinsic evidence should be limited to documents included in the public record as part of the Tunney Act proceeding such as the DOJ's Competitive Impact Statement7 and its responses to public comments. (See 10/27/97 Tr. at 4-6.) That is wrong, but even the record of the Tunney Act proceeding is sufficient to refute the DOJ's position in this case.

1. The DOJ's Response to Public Comments. As an initial matter, the only document from the Tunney Act proceeding that has any bearing on the meaning of the proviso of Section IV(E)(i) is the DOJ's response to a public comment from a company called Micro System Options complaining about Microsoft's incorporation of a three-dimensional graphics tool acquired from Silicon Graphics into Windows NT 3.5. See Department of Justice, Response of the United States to Public Comments Concerning the Proposed Final Judgment, 59 Fed. Reg. 59,426 (1994). In that situation, Microsoft's development of an "integrated product" consisted of incorporating a tool developed by another company into a Microsoft operating system. The tool was still available separately from Silicon Graphics and continued to be licensed by Silicon Graphics to other operating system vendors.

In responding to the Micro System Options comment, the DOJ expressly stated that its "Complaint does not challenge as violations of the antitrust laws Microsoft's inclusion of new software features in its operating system products." 59 Fed. Reg. at 59,428. The DOJ explained:

> Over the past fourteen years, Microsoft has developed and sold numerous successive versions of its operating system products, each more advanced and con taining more features than the previous one. Whenever Microsoft adds an attractive feature to its operating system products, it reduces the demand for software

> products sold by third parties as a complement to the Microsoft product that performed similar functions.

Id. (emphasis added).

In fact, the DOJ expressly relied on the proviso of Section IV(E)(i) in explaining why Microsoft's incorporation of new features into its operating systems does not violate the Consent Decree. The DOJ noted that the proviso "explicitly states that 'this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products.'" Id. As the DOJ candidly conceded, the evidence developed during its investigation of Microsoft "would not, in its view, support a broader injunction." Id. Moreover, the DOJ stated without qualification that such a broad injunction "generally would not be consistent with the public interest." Instead, the DOJ took the position that "[a]ctivity of this sort requires case by case analysis." Id. "Case-by-case analysis" could not have been a reference to the Consent Decree-which must provide clear guidance as to what is and is not prohibited-but was instead a reference to whatever Sherman Act standards may govern "technological tying" claims.

The DOJ's response to the public comment from Micro System Options refutes the DOJ's current interpretation of the proviso of Section IV(E)(i). The DOJ cannot take a position here that is diametrically opposite to the position it took before this Court during the Tunney Act proceeding. See Western Elec. Co., 12 F.3d at 230-31 (interpreting consent decree based on the DOJ's response to public comments). In fact, the DOJ's response to the Micro System Options comment constitutes a binding judicial admission by the DOJ that ought to end this case.8

2. The Negotiating History the Consent Decree. The DOJ is simply wrong about the types of extrinsic evidence the Court may examine in determining the meaning of Section IV(E)(i). As the Supreme Court has held, because a consent decree "is to be construed for enforcement purposes basically as a contract," it is perfectly proper for the Court to rely upon traditional aids to contract construction, such as "the circumstances surrounding the formation of the consent order." United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975). Such reliance on extrinsic evidence "does not in any way depart from the 'four corners' rule of Armour." Id.

In examining the circumstances surrounding formation of the Consent Decree, the Court is free to consider extrinsic evidence regarding the negotiations leading up to the Consent Decree, including drafts and other documents exchanged between the parties that illuminate the meaning of disputed provisions. See, e.g., United States v. CBS, Inc., 1981-2 Trade Cas. (CCH) 4 64,227, at 73,881 (C.D. Cal. Aug. 7, 1981) (relying on "documents sent by network counsel to the government during the settlement negotiations"); United States v. Olin Ski Co., 503 F. Supp. 141, 144 (S.D.N.Y. 1980) (looking to "successive drafts" of relevant provision of consent decree); United States v. Bestline Prods. Corp., 412 F. Supp. 754, 769 (N.D. Cal. 1976) (relying on letter sent by defendant's counsel to DOJ during negotiation of consent decree); see also Dr. Pepper/Seven-Up Cos. v. FTC, 151 F.R.D. 483, 489 (D.D.C. 1993) (relying on "extrinsic evidence from the [consent decree's] negotiating history"). As one court put it, by considering such extrinsic evidence, courts can determine the "reasonable

expectations of the parties at the time they entered into the [consent decree]." United States v. Motor Vehicle Mfrs. Ass'n, 643 F.2d 644, 651 (9th Cir. 1981).

In this case, the negotiations leading up to the Consent Decree demonstrate beyond peradventure that Microsoft's interpretation of Section IV(E)(i) is correct. Notwithstanding its current posture, the DOJ expressed no concern during those negotiations about Microsoft's inclusion of new features and functions in its operating systems. As a result, that topic was not mentioned in either the DOJ's initial settlement proposal to Microsoft or its complaint. (Urowsky Aff. 7.) Moreover, from the start of the trilateral negotiations among Microsoft, the DOJ and DG IV, Microsoft steadfastly opposed any governmental effort to dictate the design of Microsoft's software products. (Urowsky Aff. 20, 24.) In fact, Microsoft's counsel drafted the proviso and insisted that it be included in Section IV(E)(i) to prevent precisely the sort of interference with product design decisions that the DOJ is now attempting. (Urowsky Aff. 28-31.) Microsoft made it clear throughout the negotiations that its unfettered liberty to design its software products free from meddling by the DOJ and DG IV was crucial, and Microsoft would never have entered into the Consent Decree unless that liberty was clearly preserved. (Urowsky Aff. 20, 24, 28-31, 34.) In filing its petition, the DOJ is dishonoring the agreement it reached with Microsoft more than three years ago.

In sum, just because Windows 95 includes features and functions that may also be available separately in the marketplace does not mean it is not an "integrated product" for purposes of Section IV(E)(i). If the DOJ had intended to impose a limitation on the normal meaning of "integrated," then it should have insisted on a specialized definition of the term in the Consent Decree. It did not, and Microsoft would have rejected any such limitation in any event.

E. The DOJ's Criteria for Determining Whether Products Are Separate Are Entirely Beside the Point and Have No Place in a Contempt Proceeding.

The DOJ enumerates a number of criteria that it contends the Court should consider in deciding whether Microsoft should be prohibited from including Internet-related technologies in Windows 95. All of these criteria are supposedly useful in determining whether the Internet Explorer element of Windows 95 is, in reality, a "separate product." (See DOJ Mem. at 19-28.) For the reasons explained previously, the entire thrust of the DOJ's argument is beside the point because there is no reason why a "separate product" cannot also be part of an "integrated product" under the proviso of Section IV(E)(i). Otherwise, the right reserved to Microsoft to create integrated products would be an empty one.

The DOJ's assertion that its newly-formulated indicia of "separateness" preclude a finding that Internet Explorer is an integral element of Windows 95 suffers from additional flaws. For one thing, none of the criteria now put forward by the DOJ was even mentioned during the negotiations leading up to the Consent Decree. That is because nobody ever contemplated that the DOJ would later challenge Microsoft's inclusion of particular features and functions in its operating systems as a violation of Section IV(E)(i). Simply stated, the DOJ's criteria are a recent invention with no basis in the Consent

Decree.

Moreover, the DOJ's criteria, taken together, do not constitute the sort of objective, verifiable standards that a consent decree must contain if it is to be enforceable. Instead, the DOJ's criteria require the balancing of multiple subjective factors, such as the "perceptions" of competitors and customers, in reaching a conclusion about whether Windows 95 and Internet Explorer are "separate products." Because injunctive orders like the Consent Decree impose the threat of contempt sanctions, the party enjoined must "receive explicit notice of precisely what conduct is outlawed." Schmidt v. Lessard, 414 U.S. 473, 476 (1974).9 The procedure proposed by the DOJ, which depends on a wholly indeterminate weighing of a number of subjective factors, is inconsistent with the requirement that injunctive orders specify with reasonable clarity the conduct that they proscribe. See International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 76 (1967); Paralyzed Veterans of Am., Inc. v. Washington Metro. Area Transit Auth., 894 F.2d 458, 460 (D.C. Cir. 1990); Common Cause, 674 F.2d at 927.

Even if it were appropriate to consider the criteria enumerated by the DOJ, close examination reveals that they fail to support the DOJ's claim that Windows 95 and its Internet Explorer element are "separate products"-which is not dispositive of the issue before the Court in any event. The following examination of those criteria reveals numerous flaws in the DOJ's logic and the DOJ's profound misunderstanding of the facts.

1. Existence of Separate Consumer Demand. The DOJ contends that "[t]here is separate demand for Internet browser products . . ., on the one hand, and Windows 95, on the other." (DOJ Mem. at 20.) The existence of separate consumer demand for particular features and functions of an operating system, however, does not mean that those features and functions cannot be elements of a single "integrated product" for purposes of the proviso of Section IV(E)(i). Granted, Netscape sometimes markets its browser software apart from operating systems-although Netscape's browser software is also included as part of a large number of operating systems-but that has no bearing on whether Internet Explorer is an integral element of Windows 95. For example, auto parts stores sell batteries separate from automobiles, yet no one would suggest that a battery is not an integral element of a new car.

2. Distribution of Updated Versions of Internet Explorer to the Installed Base of Windows 95 Users. The DOJ notes that Microsoft separately distributes the Internet Explorer element of Windows 95 to users via the Internet and the retail channel. (See DOJ Mem. at 21.) Microsoft undertakes such efforts to make updated elements of its operating system broadly available to existing users of Windows 95. (Chase Decl. 3, 6, 8, 20; Ransom Decl. 9; Rose Decl. 9.) Microsoft's willingness to provide the installed base of Windows 95 users with progressively improved versions of Internet Explorer does not establish that Internet Explorer is something other than an integral element of Windows 95. The DOJ's position is no dif ferent from saying that updated pages to a loose-leaf treatise must be regarded as a separate "product" because they were not included with the treatise ab initio. This makes no sense.

The DOJ's suggestion that Microsoft's distribution of updated elements of Windows 95 to the installed base of users

prevents Microsoft from simultaneously providing such updated elements to computer manufacturers for shipment with their new machines would lead to absurd results that injure consumers. There is no sensible reason why consumers should have to wait until Microsoft's next major release of Windows 95, i.e., Windows 98, to obtain IE3.0 and IE4.0. Such technology has been fully developed and tested by Microsoft, and it should not sit on the shelf for months or years simply to avoid the risk that the DOJ might argue that dissemination of the technology in advance of a new major release of the operating system constitutes the creation of a "separate product." Microsoft's willingness to provide its customers with free upgrades of Internet Explorer between major releases of Windows 95 is unambiguously good for consumers.

The DOJ places great emphasis on the fact that IE4.0 "is currently distributed to OEMs on a separate CD-ROM" (DOJ Mem. at 22 (emphasis in original))-as if that were probative of anything. The fact that an element of Windows 95 can be shipped on a physical medium separate from the rest of the operating system is meaningless. The retail upgrade version of Windows 95 comes on more than twelve floppy diskettes for users who do not have a CD-ROM drive, but that does not mean that Windows 95 is twelve separate products.

The DOJ's insistence that IE4.0 is a "stand-alone product" is apparently premised on the misconceived notion that installing this updated element of the operating system entails nothing more than layering additional code on top of an existing copy of Windows 95. That assumption is mistaken as a technical matter-when installed, IE4.0 pervades the operating system. The installation program for IE4.0 rips out substantial portions of Windows 95 and replaces them with new code needed to support IE4.0's new features and functions. (Cole Decl. 5, 46.)

Recognizing the extent to which Internet Explorer is integrated into Windows 95, both Netscape, the intended beneficiary of the DOJ's petition, and numerous commentators have observed that IE4.0 is actually an upgrade to the operating system. (Chase Decl. 15-16.) Indeed, in contrasting its browser software with IE4.0, Netscape characterized IE4.0 as "virtually an operating system upgrade." (Chase Decl. 16 & Ex. D.) Microsoft could easily have called IE4.0 something like "Windows 95 Upgrade." The name Microsoft has chosen for this element of Windows 95 is irrelevant to whe ther Internet Explorer is part of an "integrated product" under Section IV(E)(i).

3. Development of Internet Explorer Versions for Other Operating Systems. The DOJ attributes great significance to the fact that Microsoft has developed versions of IE3.0 "for a non-Microsoft operating system, Apple Computer's Macintosh," and that Microsoft has stated its intention to offer versions of IE4.0 "for Macintosh and Sun's Solaris operating system." (DOJ Mem. at 22 (emphasis in original).) Microsoft's creation of Internet Explorer versions for operating systems other than Windows 95 does not mean that Internet Explorer is not an integral part of Windows 95. Although they share the same name, Internet Explorer versions for operating systems other than Windows 95 have been customized for use with those other operating systems and, as such, are quite different-in fact, they are built on different code bases. (Chase Decl. 26.)

4. Occasional References to Internet Explorer as a

"Product." The DOJ points out that the End User License Agreements for the retail version of IE3.0 and for the version of IE4.0 available for downloading from the Internet refer to Internet Explorer as a "product." Of course, when Microsoft distributes updated elements of Windows 95 between releases of the operating system, it is not going to do so without imposing normal restrictions on end user licensees, such as prohibiting the disassembly of Microsoft's code. The fact that such standard form agreements refer to Internet Explorer as a "product" for want of a better word has no legal significance.

5. "Commercial Norm" in Distributing Internet-Related Technologies. The DOJ suggests that the commercial norm is to "offer Internet browsers and operating system products separately." (DOJ Mem. at 26.) In fact, it is equally common to distribute Internet-related technologies as elements of operating systems, and that has been true since before Netscape was founded. (Chase Decl. 12, 21; Krauskopf Decl. 7.) Microsoft is not alone in including Internet-related technologies in its operating systems. As the DOJ well knows, every other major operating system vendor also includes such technologies in its products because that is what consumers are perceived to want. (Cole Decl. 15.)

It may well be, as the DOJ suggests (see DOJ Mem. at 8-9 & n.3), that Netscape's browser software-which is purportedly used by more than 70% of persons who access information on the Internet-can properly be viewed as an application as opposed to an element of an operating system because Netscape says it has designed its browser software to run unmodified on a wide variety of operating systems. (Allaire Decl. 7; Ramadan Decl. 6.) The fact that one competitor claims to have adopted a cross-platform strategy, however, does not mean than Microsoft cannot incorporate Internet-related technologies directly into Windows 95 to insure the best possible user experience.

In arguing that the "commercial norm" is defined by Netscape's approach, the DOJ seems to be relying on the notion that there is an objectively ascertainable and widely understood definition of what is and is not contained in an operating system like Windows 95. Nothing could be further from the truth. An operating system consists of a rapidly evolving set of features and functionality. What goes into the operating system is a design decision determined by what consumers are perceived to want. (Cole Decl. 8.) Consumers clearly want operating systems that include Internet-related technologies (Morris Decl 4; Ransom Decl. 3; Rose Decl. 4), and Microsoft has designed Windows 95 to meet that demand.

6. "Commercial Feasibility" and "Physical Possibility" of Distributing Internet Explorer Separate from the Remainder of Windows 95. The DOJ contends that it is "com mercially feasible not to require OEMs or PC users" to license Internet Explorer as part of Windows 95 and that it is "physi cally possible to keep IE4.0 and Windows 95 separate." (DOJ Mem. at 26-27.) Neither observation, however, is relevant to what constitutes an "integrated product" under the proviso of Section IV(E)(i) of the Consent Decree.

It would not be "commercially feasible" for Microsoft to remove large portions of Windows 95 and distribute those elements separately. For example, it might be possible for Microsoft to stop supplying the color schemes, background patterns and screen savers included with Windows 95 and require

consumers to license such features separately. Microsoft has determined that consumers want full-featured operating systems that perform a very broad range of functions without the need to purchase supplemental products of uncertain compatibility. (Cole Decl. 33.) It would be senseless for Microsoft to degrade its operating systems to the point where they provide only the most rudimentary functionality, distributing sepa rately all of the various features that consumers have come to expect. Such a strategy of disintegration would make computers more expensive and difficult to use, thereby reducing overall demand-the exact opposite of what Microsoft is trying to accom plish with the design of its operating systems. (Cole Decl. 8, 93; Chase Decl. 25.)

It would be "physically possible" for Microsoft to separate any element of Windows 95 from the remainder of the operating system, but that is an unremarkable observation. After all, Windows 95 is a piece of software comprising millions of lines of code, not some physical product that is welded or glued together. Of course, removing elements of Windows 95 will cause the operating system to perform fewer functions and may cause the operating system not to work at all, depending on which elements are removed. (Cole Decl. 7, 92, 93.) Thus, the DOJ's unsupported assertion that removing the Internet Explorer element of Windows will have no effect on the ability of the operating system "to perform fully and effec tively all of its functions" is misguided at best. (DOJ Pet. 26.) The DOJ assumes the argument away by defining the func tionality of Windows 95 to exclude the features and functionality provided by Internet Explorer. (See DOJ Mem. at 9-10.) This is pure sophistry. As explained above (see page 8, supra), the Internet Explorer element of Windows 95 provides a range of operating system services utilized by other portions of the operating system as well as by other software products. If Internet Explorer is removed, the performance of Windows 95 will be degraded. (Cole Decl. 47, 55.)

7. "Strategic Marketing and Distribution Decisions." The DOJ portrays Microsoft's inclusion of Internet-related technologies in Windows 95 as nothing more than "a strategic marketing and distribution decision." (DOJ Pet. 27.) On the contrary, Microsoft's decisions about what features and functions are part of the package of software that constitutes an operating system is a product design decision, albeit one motivated by strategic considerations-most importantly, the changing nature of customer demand. (Chase Decl. 3, 25.) Consumers want Internet-related technologies in their operating systems, and Microsoft is striving to meet that demand. There is nothing special about the Internet Explorer element of Windows 95 in this regard. Microsoft has been including progressively more and more features in its oper ating systems for the last sixteen years, as the DOJ acknowledged during the Tunney Act proceeding. (See page 14, supra.)

In arguing that it was somehow inappropriate for Microsoft to include Internet-related technologies in Windows 95, the DOJ asks the Court to apply a static definition to an inherently dynamic product. By making such a request, which would be flatly contrary to the letter and spirit of the proviso of Section IV(E)(i), the DOJ threatens to freeze the development of Microsoft operating systems as of 1995. The marketplace-not the DOJ-should determine how operating systems

are designed. If the DOJ had halted the evolutionary process of operating system development ten years ago, consumers would have been denied the benefits of all the innovative work that Microsoft and its competitors have done in making computing more accessible, efficient, robust and fun. The Consent Decree was not intended to stand in the way of such technological progress.

* * *

Referring again to the DOJ's response to the public comment from Micro System Options during the Tunney Act proceeding, it is notable that the 3-D graphics tool at issue in that response fails every one of the criteria proffered by the DOJ for determining whether something constitutes a "separate product." What this demonstrates is that those criteria have no sensible connection to the question of whether particular features and functionality constitute an element of an "integrated product" under the proviso of Section IV(E)(i). It is also notable that in responding to the Micro System Options comment, the DOJ did not purport to apply any of those criteria-or even advert to them.

F. The DOJ's Discussion of Microsoft's Intent Is Irrelevant and Reveals the Contradictions in the DOJ's Own Arguments.

The DOJ devotes a large portion of its memorandum to arguing that Microsoft's intent in including Internet-related technologies in Windows 95 is to prevent a "challenge to Microsoft's monopoly in the PC operating system software market." (DOJ Mem. at 31.) Putting aside for the moment the unsupported major premise of that argument, Microsoft's intent is not relevant to this contempt proceeding, as the DOJ begrudgingly admits. (See DOJ Mem. at 11.) As a matter of contract interpretation, Microsoft's incorporation of Internet-related technologies into Windows 95 is beyond the scope of the Consent Decree, regardless of Microsoft's business rationale for doing so.

Even if Microsoft's intent were a proper subject of inquiry, there is no basis for the DOJ's suggestion that Microsoft is pursuing an improper objective in including Internet-related technologies in Windows 95. Microsoft is, as it should be, enhancing its products in response to perceived consumer demand.

In discussing Microsoft's intent, the DOJ apparently fails to appreciate the inherent contradictions in its own arguments. If a "browser" is limited to software used to view HTML content on the Internet, as the DOJ suggests at one point in its memorandum (see DOJ Mem. at 8), then such software can pose no threat to a full-featured operating system like Windows 95. If, on the other hand, a "browser" encompasses the range of traditional operating system services that Netscape claims will be included in future versions of its products, as the DOJ suggests at another point (cf. DOJ Mem. at 31-33), then it is plain that the sharp distinction the DOJ seeks to draw between "browsers" and "operating systems" is entirely artificial. To the extent that Microsoft's competitors are developing alternatives to Windows 95, which they are certainly entitled to do, the Consent Decree allows Microsoft to enhance its products in response to such competitive offerings.

As the DOJ notes (see, e.g., DOJ Mem. at 32), strong

and well-financed competitors of Microsoft such as Sun Microsystems and Netscape are seeking to render Windows 95 and other Microsoft operating systems obsolete by creating so-called "middleware" layers that obscure the underlying oper ating system. Apparently in the DOJ's view, Microsoft should be forced to sit on its hands while competitors attempt to take away one of the most important aspects of Microsoft's business. The antitrust laws require no such thing. See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) (even a firm with a large market share need not pull its "competitive punches"), cert. denied, 480 U.S. 934 (1987). Microsoft is free to do whatever it can to maintain the popularity of its operating systems, so long as it does not engage in predatory conduct. Adding new features and functionality to operating systems to keep them competitive is not predatory; it is standard business practice that benefits consumers.

The antitrust laws exist to insure that companies compete with all of the tools at their disposal-even if such competition results in casualties because competitors do not or cannot keep up. See Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982). The Consent Decree does not give the DOJ authority to regulate the design of Microsoft's products merely because the DOJ is concerned that Microsoft will be too successful. As the Supreme Court observed in Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993), precisely because it is "sometimes difficult to dis tinguish robust competition from conduct with long-term anti competitive effects," id. at 458-59, use of the antitrust laws to moderate contests like the one currently raging among Microsoft, Netscape and others-a contest that has provided consumers with a steady stream of innovative technologies at extremely attractive prices-should be avoided for fear that such intervention will "chill competition rather than foster it," id. at 458.

III. The DOJ Is Barred by the Doctrine of Equitable Estoppel From Challenging Microsoft's Incorporation of Internet-Related Technologies into Windows 95.

Although the United States is not subject to the defense of laches, see United States v. Summerlin, 310 U.S. 414, 416 (1940), the "principle of equitable estoppel applies to government agencies, as well as private parties." Investors Research Corp. v. SEC, 628 F.2d 168, 174 n.34 (D.C. Cir. 1980), cert. denied, 449 U.S. 919 (1980). Under the doctrine of equitable estoppel, a government agency is barred from bringing an action if, despite knowledge of the defendant's conduct, it delayed in commencing the action and the defendant reasonably relied to its detriment on the agency's failure to act earlier. See United States v. Georgia-Pacific Co., 421 F.2d 92, 97-98 (9th Cir. 1970); cf. United States v. Atlantic Refining Co., 360 U.S. 19, 22-23 (1959) (government's acquiescence in defendant's conduct precludes later attempt to interpret con sent decree as prohibiting such conduct).

The DOJ has known about Microsoft's inclusion of Internet-related technologies in Windows 95 for more than three years. At least by July 1994, when the DOJ and Microsoft were negotiating the Consent Decree, the DOJ knew of Microsoft's plans in this regard. (See Sinofsky Decl. 2, 4, 5, 7-10.) The DOJ also knew that Windows 95 would include Internet-

related technologies during the fourteen months that the Tunney Act proceeding was pending. (See Holley Aff. 3.) When the Consent Decree was entered in August 1995, the DOJ knew that Microsoft had already supplied a version of Windows 95 to compu ter manufacturers that included an Internet Explorer element. (See Sinofsky Decl. 16; Holley Aff. 3-5.) Finally, the DOJ knew that Windows 95 included Internet-related technologies under the rubric of Internet Explorer throughout the thirteen-month investigation that resulted in the filing of the DOJ's petition. (See Holley Aff. 6.)

Despite this knowledge, the DOJ did not raise Microsoft's incorporation of Internet-related technologies into Windows 95 issue during the negotiations leading up to the Consent Decree, abjured its present position during the Tunney Act proceeding and failed to take any action challenging that action until October 1997, i.e., until after Microsoft launched IE4.0 on September 30, 1997. Meanwhile, Microsoft has expended large sums of money developing successive versions of Internet Explorer as an integral element of Windows 95 in reliance upon its clear right to do so under the Consent Decree. In fact, achieving the seamless integration of Internet-related technologies into Windows 95 has been a principal focus of Microsoft's operating system development efforts over the last two years. (Cole Decl. 6.) Having delayed commencement of these proceedings for so long, the DOJ should be barred from now contending that the presence of Internet Explorer in Windows 95 violates Section IV(E)(i) of the Consent Decree.

IV. The DOJ's Challenge to Non-Disclosure Agreements to Which Microsoft Is a Party Should Be Dismissed.

The DOJ challenges certain non-disclosure agreements ("NDAs") to which Microsoft is a party. (See DOJ Mem. at 36-39.) As is typical of such agreements, the NDAs require each party to give the other party notice and an opportunity to object before disclosing confidential information to third parties. The DOJ asserts, without foundation, that there is a "substantial risk" that such NDAs "have chilled, and unless terminated will continue to chill, disclosure of information about possible unlawful Microsoft conduct by companies or indi viduals." (Id. at 38.) At the October 27, 1997 scheduling conference, the DOJ elaborated on its purported concern:

> The Government is in the midst of a much broader, ongoing investigation of a variety of Microsoft's conduct beyond the specific issues that are addressed here in this proceeding, some of which may raise further consent-decree issues and some of which may raise the potential for violations of the various antitrust laws. The investigation is ongoing, and the risk that people might be chilled from providing information about whatever sort of activity, as part of that investigation, I think, is very real.

(10/27/97 Tr. at 19.) According to the DOJ, the mere possibility of a "chilling effect" makes it "an appropriate and warranted use of the Court's power to order that [the NDAs] not be enforced." (DOJ Mem. at 39; accord DOJ Pet. 32.)

The DOJ's challenge to the NDAs is baseless and should be dismissed in its entirety for the following reasons.

A. The DOJ Fails to Identify Any Provision of the Consent Decree

That the Non-Disclosure Agreements Allegedly Violate.

As an initial matter, the DOJ's challenge to the NDAs is not a proper subject of a civil contempt proceeding because the DOJ does not contend that the NDAs violate any provision of the Consent Decree. The only provisions of the Consent Decree that mention NDAs address a completely different subject, i.e., agreements between Microsoft and third-party software developers who receive a "pre-commercial release" of a Covered Product. (See Consent Decree II(8), IV(K).) The DOJ does not-and cannot-suggest that Microsoft is not in full compliance with those provisions.

The DOJ instead bases its challenge to the NDAs on Section V of the Consent Decree, which provides the DOJ with various mechanisms to "determine and secure compliance" with the Consent Decree. Contrary to the DOJ's suggestion, Section V of the Consent Decree does not empower the Court, through civil contempt proceedings, to void contracts to which Microsoft is a party simply because the DOJ hypothesizes that abrogation of such contracts might assist the DOJ in its "ongoing investigation" of a "variety of Microsoft's conduct" for possible "violations of the various antitrust laws." (10/27/97 Tr. at 19.)

What the DOJ is really requesting here is a modification of the Consent Decree based on its vague and unsupported assertion that the NDAs are impeding the DOJ's persistent investigations of Microsoft. Such a request has no place in a civil contempt proceeding,10 and the relief sought is unwarranted in any event.

B. The DOJ Has No Evidence That the Non-Disclosure Agreements Have Had Any "Chilling Effect."

The DOJ does not cite any evidence, in either its petition or its supporting memorandum, that NDAs to which Microsoft is party have in fact prevented anyone from com municating complaints about Microsoft to the DOJ. In fact, the

Assistant Attorney General admitted during the press conference announcing the commencement of this case that the DOJ has "no way of knowing whether these agreements have deterred people from voluntarily coming forward with information," and that the DOJ has simply "heard this might be the case." (Hruska Aff. Ex. D.) Such speculation is not an appropriate basis for seeking modification of the Consent Decree, much less contempt sanctions.

Moreover, the DOJ's contention that the NDAs may be having a chilling effect on potential complainants is belied by the facts. Hostile commentary regarding Microsoft's purported business practices abounds in the general media and the software industry trade press, and that commentary shows no signs of abating. Plainly, none of Microsoft's vocal critics, who lambaste the company on a regular basis on any number of topics, is the slightest bit intimidated by Microsoft. Moreover, the only person in this country unaware that the DOJ is fully receptive to complaints about Microsoft is Rip Van Winkle. Two years ago, the New York Times quoted the former Assistant Attorney General as saying that the DOJ was open for business as a "Microsoft complaint center," Steve Lohr, Gates, the Pragmatist, Walked Away, N.Y. Times, May 22, 1995, at D1 (Hruska Aff. Ex. E), and the DOJ has been busily engaged in highly publicized investigations of Microsoft virtually on a

non-stop basis ever since.

C. The DOJ Has Sufficient Means at Its Disposal to Investigate Possible Violations of the Consent Decree.

The DOJ's assertion that the wholesale abrogation of routine confidentiality provisions is necessary to permit the DOJ "to investigate whether Microsoft is complying with" the Consent Decree (DOJ Mem. at 37) cannot withstand scrutiny. The DOJ has broad powers under the existing compliance provisions of the Consent Decree to obtain information from Microsoft about the conduct of its business. The DOJ also has the ability to issue compulsory process to obtain whatever information it needs to investigate Microsoft's business practices. Moreover, there is no reason why third parties are required to disclose Microsoft's confidential information to lodge a complaint about Microsoft with the DOJ. The DOJ is sophisticated enough to know how to issue Civil Investigative Demands to obtain evidence relating to such complaints.

In short, the DOJ has made no showing that the Consent Decree should be modified to expand the DOJ's already extensive powers to compel production of relevant information. In the absence of such a showing, the DOJ's challenge to the NDAs smacks of an effort to tar Microsoft with the insinuation that it has engaged in obstruction of justice. The DOJ should not engage in that sort of smear campaign, particularly when its motivation is so transparent.

D. Microsoft Has Disavowed Any Interpretation of the Non-Disclosure Agreements That the DOJ Claims Might Exert a "Chilling Effect."

From Microsoft's perspective, the DOJ's challenge to the NDAs came entirely out of the blue. On both occasions when the DOJ asked Microsoft to disclaim any interpretation of the NDAs that might interfere with pending DOJ investigations, Microsoft readily complied. (See, e.g., DOJ Pet. Ex. 32.) Microsoft had no inkling that the DOJ was unsatisfied with those disclaimers until one week before the DOJ filed its petition. The DOJ admits that Microsoft informed the DOJ four years ago and again recently that-in view of the protections afforded confidential information subpoenaed by the DOJ under federal law-Microsoft would disclaim any interpretation of the NDAs that required other parties to those agreements to inform Microsoft of their dealings with the DOJ. (See DOJ Mem. at 38.) The DOJ now suggests, however, that those statements are insufficient because, although the DOJ can inform and has informed numerous companies of Microsoft's position, there is a possibility that some company or individual may elect not to approach the DOJ for fear of violating an NDA with Microsoft. (See id. at 38-39.) As noted above, that supposition is unsupported by any evidence. Moreover, the enormous publicity surrounding this case guarantees that the entire software industry is aware of Microsoft's benign interpretation of the NDAs.

E. The Non-Disclosure Agreements in Question Are Commonplace in Commercial Transactions.

The sweeping relief sought by the DOJ-the abrogation of all NDAs to which Microsoft is a party-would be grossly unfair to both Microsoft and the other parties to those

agreements. Contracts used in American business routinely provide that one party will not disclose confidential information without giving the party who provided such infor mation prior notice and an opportunity to object. Absent such a provision, a party would not even know that its confidential information was at risk until after it had been disclosed, if it ever knew. Advance notice gives the party whose confidential information is imperiled an opportunity to object to its disclosure or take reasonable steps, such as seeking the entry of a protective order, to safeguard the confidentiality of that information.

Literally thousands of contracts in every conceivable industry contain similar non-disclosure provisions, so much so that the language challenged by the DOJ has become boilerplate. In fact, treatises and form books instruct lawyers to use such language. See, e.g., Gregory J. Battersby & Charles W. Grimes, Multimedia & Technology Licensing Agreements: Forms and Commentary 2-12 (1997); Henry Beck, Model Software License Provisions, in How to Draft, Negotiate and Enforce Licensing Agreements 299, 326 (Practicing Law Institute, 1997); Robert Goldscheider, Eckstrom's Licensing in Foreign and Domestic Operations: The Forms and Substance of Licensing 2-284 to 2-285 (1997); id. at CL7-16; 3 Melvin F. Jagar, Trade Secret Law at App. C1-5 (1997); 1 Richard Raysman & Peter Brown, Computer Law: Drafting and Negotiating Forms and Agreements at 6-58 (1997) (Hruska Aff. Exs. F-J). Such provisions are particularly important, however, in an intellectual property business like software, where the principal assets of a company are not factories and equipment, but ideas. Because ideas are extremely easy to misappropriate, software developers must take special precautions to preserve the confidentiality of their valuable proprietary information.

The DOJ was well aware of the existence of NDAs at the time the Consent Decree was signed, but the DOJ never suggested that they had the deleterious effect it now posits. Against that background, the DOJ's thinly-veiled suggestion that the NDAs are part of a plot by Microsoft to prevent the DOJ from investigating Microsoft's business practices is both preposterous and deeply offensive.

V. Microsoft Cannot Be Subjected to Contempt Sanctions Without a Full Evidentiary Hearing.

In response to Microsoft's proposed pretrial procedure contemplating discovery and an evidentiary hearing, the DOJ took the position at the October 27, 1997 scheduling conference that "this is a very straightforward consent decree violation matter, not a big stand-alone antitrust case," thereby implying that the DOJ's petition could be treated like a routine motion and disposed of on the papers. (10/27/97 Tr. at 2.) In Microsoft's view, the claims in the DOJ's petition are completely unsubstantiated, and thus the Court can simply deny the DOJ's petition at this juncture.11 However, because Microsoft disagrees with a great many factual assertions contained in the DOJ's petition-assertions based largely on inadmissible hearsay-the finding of contempt sought by the DOJ cannot be made without an evidentiary hearing. See Pennwalt Corp. v. Durand-Wayland, Inc., 708 F.2d 492, 495 (9th Cir. 1983); Sanders v. Monsanto Co., 574 F.2d 198, 200 (5th Cir. 1978).

If the Court decides that the DOJ's petition warrants

further proceedings, Microsoft requests that the Court adopt the proposed schedule set out at pages 8 and 9 of the Memorandum of Microsoft Corporation in Advance of the October 27, 1997 Scheduling Conference Before the Court. That schedule provides for appropriate discovery and motion practice leading up to an evidentiary hearing on the merits of the DOJ's claims.

The DOJ cannot identify any exigent circumstances that warrant a departure from established rules of procedure or that support the DOJ's request for entry of a contempt finding on a summary basis. As explained above, the DOJ knew that Microsoft was incorporating Internet-related technologies in Windows 95 before the negotiations leading up to the Consent Decree began. (See pages 6-7, supra.) Moreover, the DOJ was intimately familiar with Microsoft's license agreements with computer manufacturers, and thus knew that such computer manu facturers are not permitted to delete any element of Windows 95, including Internet Explorer. The DOJ likewise knew that Microsoft had provided interim releases of Windows 95 to computer manufacturers during 1995 and 1996, called Service Release 1 and OEM Service Release 2, which included updated versions of Internet Explorer (along with numerous other improvements to the operating system). (See Chase Decl. 4-5.) Lastly, Microsoft demonstrated a beta test copy of IE4.0 to the DOJ in November 1996 and explained in great detail its efforts to upgrade the Internet Explorer element of Windows 95 and distribute it as part of the operating system through computer manufacturers. (Holley Aff. 6.)

The only circumstance that changed in recent days was Microsoft's launch of IE4.0 on September 30, 1997. To the DOJ's apparent chagrin, IE4.0 has been met with rave reviews, causing commentators to predict that Windows 95, with its updated Internet Explorer element, will soon be more popular than Netscape's Navigator as a means of securing information from the Internet. Consumers appear to like IE4.0 very much, having downloaded more than one million copies of it during the first 48 hours it was available on the Internet. (Chase Decl. 28.)

Although the DOJ professes not to be "taking sides" in a competitive battle that continues to provide clear benefits to consumers (see DOJ Mem. at 46), that is precisely what the DOJ is doing in requesting that the Court order Microsoft to remove Internet-related technologies from Windows 95. The DOJ's request represents an extraordinary departure from the antitrust laws, and it should not be entertained without the most careful consideration of the potentially disas trous consequences such governmental interference in product design decisions could have on one the country's most important industries.

VI. The DOJ Should Be Required to Respect the Confidential Nature of Microsoft's Valuable Proprietary Information.

The DOJ has already demonstrated a shocking disregard for the confidentiality of documents subpoenaed from Microsoft in the course of the DOJ's investigation. The Court should insist that the DOJ refrain from inflicting further injury on Microsoft by disclosing additional confidential information as part of the DOJ's publicity campaign. If the DOJ had a defensible legal position in this case, it would be pressing that position in court, not on the television news.

A. The DOJ Improperly Disclosed Confidential Microsoft Documents Before This Court Was Given

Any Opportunity to Enter a Protective Order.

During the course of the DOJ's investigation, Microsoft produced thousands of pages of documents to the DOJ, many of which contain highly sensitive business secrets. Those documents were produced both under the compliance provisions of the Consent Decree, as well as in response to Civil Investigative Demands ("CIDs") issued by the DOJ under the Antitrust Civil Process Act, 15 U.S.C. 1311-14 (the "Act"). Microsoft plainly marked documents that contained business secrets "Confidential" to alert the DOJ that those documents should be given confidential treatment. In addition, Microsoft sent documents to the DOJ under cover of letters expressly requesting that the DOJ give those documents the fullest possible protections available under the law.

The DOJ does not deny that it was on notice that documents produced by Microsoft "include proprietary information," and that Microsoft asked the DOJ to give those documents "the highest level of confidentiality protection available under compulsory process." (DOJ Sealing Motion at 2.) Nevertheless, the DOJ decided-without giving Microsoft any prior notice and thereby depriving the Court of any opportunity to consider the matter-to include various confidential Microsoft documents in the publicly filed exhibits in support of its petition. The DOJ seeks to justify such disregard of its statutory obligations to maintain the confidentiality of Microsoft's confidential information based on its entirely unexplained conclusion that internal Microsoft documents reflecting communications among Microsoft's most senior executives about issues of strategic importance "do not appear to have significant potential to contain confidential business information." (DOJ Sealing Motion at 3.) That conclusion-with which Microsoft vehemently disagrees-is not one the DOJ was entitled to make.

At the October 27, 1997 scheduling conference, the DOJ took the position that the Act imposes no "requirement for either authorization from the Court or a disclosure to defen dants" before the DOJ publicly discloses confidential information obtained by means of compulsory process "in a legal proceeding involving the defendant." (10/27/97 Tr. at 17.) That interpretation of the Act-which creates a gaping hole in its confidentiality protections-would give the DOJ absolute discretion to disclose extremely confidential information obtained from CID recipients pursuant to compulsory process. Such unreviewable discretion is an invitation to abuse, and is plainly not what Congress had in mind when it amended the Act in1976 to increase the protections available to CID recipients. See H.R. Rep. No. 94-1343, 94th Cong., 2d Sess. at 7-8 (1976) ("House Report"), reprinted in 1976 U.S.C.C.A.N. 2596, 2602.

It is beyond dispute that the Act prevents the DOJ custodian entrusted with confidential material produced in response to a CID from disclosing such information "without the consent of the person who produced such material." 15 U.S.C. 1313(c)(3). In a subsequent subsection, the Act provides that when a DOJ lawyer is designated to appear before a court in a proceeding, the custodian may deliver to that lawyer "for official use" in connection with the proceeding whatever material produced in response to a CID that the lawyer "deter mines to be required." 15 U.S.C. 1313(d)(1). The DOJ, without citation to any authority, takes the astonishing position that

this provision gives the DOJ carte blanche to place whatever confidential information it likes on the public record, presumably including trade secrets like the formula for Coca-Cola worth literally billions of dollars. The DOJ's position is grossly overreaching and contrary to both the legislative history of the Act and cases interpreting its provisions.

The debate surrounding the 1976 amendments to the Act clearly demonstrates that the Act requires the DOJ to accord "strict confidentiality" to all confidential material produced in response to a CID "in order to protect the reputation and standing of witnesses, as well as their trade secrets and proprietary financial data." House Report at 3, reprinted in 1976 U.S.C.C.A.N. at 2597 (emphasis added). The notion that the DOJ's obligation to preserve the confidentiality of such infor mation terminates merely because the DOJ decides to initiate a proceeding makes no sense and is contradicted by the legislative history. Taking trade secrets as an example, the House Report expressly states that "protective orders are available to guard against their prejudicial disclosure in any subsequent proceedings." House Report at 10, reprinted in 1976 U.S.C.C.A.N. at 2604 (emphasis added). Of course, such pro tective orders are not "available" if the DOJ denies the CID recipient any opportunity to seek the intervention of the Court before a "prejudicial disclosure" occurs, which is precisely what happened here.

In analogous circumstances, courts have entered protective orders requiring the DOJ to give CID recipients prior notice before using confidential information in deposi tions of third parties. As the DOJ itself has noted, the court in Aluminum Co. of Am. v. U.S. Dep't of Justice, 444 F. Supp. 1342 (D.D.C. 1978), issued a protective order requiring the DOJ to give the defendant prior notice before disclosing confidential documents to third parties in depositions, including information as to whether the third-party was a customer or a competitor. See Department of Justice, Antitrust Division Manual III-35 (2d ed. 1987), reprinted in 6A Department of Justice Manual 7-715 (1997). Such protective orders are appropriate to guard against "the danger that the Government may show the [confidential] materials to strangers." United States v. GAF Corp., 596 F.2d 10, 15 (2d Cir. 1979); accord Finnell v. U.S. Dep't of Justice, 535 F. Supp 410, 413 (D. Kan. 1982). Here, of course, the DOJ did not just show Microsoft's internal planning documents to a few customers and competitors; instead, the DOJ disclosed the documents to the world, and ironically large portions of them are now available for anyone to read on the Internet itself. If the DOJ is not free to use confidential information obtained pursuant to compulsory process in isolated depositions, then it is patently absurd to suggest that the DOJ is free to disclose publicly such confidential information before a CID recipient has been given a chance to seek a protective order.

Even the DOJ seems to appreciate the serious harm that is an inevitable consequence of its extreme position, because the DOJ filed certain confidential Microsoft documents under seal in a so-called "Confidential Appendix." Of course, that action only points up the deficiencies in the DOJ's position. In the DOJ's view, it-and it alone-gets to decide which of Microsoft's confidential documents is "truly deserv ing" of confidential treatment. Such decisions, made by persons who do not understand Microsoft's business and who are thus in

no position to assess the competitive significance of particular documents, is inherently arbitrary. More importantly, the process is not subject to any meaningful judicial review, subjecting private parties to grievous harm for which there is no effective recourse.

It is no secret why the DOJ did not come to this Court before placing confidential Microsoft documents in the public record. Within minutes after the DOJ filed its petition, the Assistant Attorney General was addressing a press conference and quoting liberally from one of the documents that Microsoft had designated as confidential. (Hruska Aff. Ex. D.) Such grandstanding at Microsoft's expense would not have been possible if the Court had entered a protective order to prevent the DOJ from violating Microsoft's rights under the Act. The Court should enter appropriate orders to insure that the DOJ does not further trample on Microsoft's rights under the Act by publicly disclosing documents that should remain confidential.

B. The Confidential Microsoft Documents Filed Under Seal by the DOJ Should Remain Under Seal.

The DOJ's intuition that the Microsoft documents included in its Confidential Appendix "potentially contain[ ] significant confidential or commercially sensitive business information" is absolutely correct. (DOJ Sealing Motion at 2.) Exhibits 3 and 4 contain detailed financial information that Microsoft maintains in strictest confidence and that its competitors would find invaluable. Exhibits 13 and 14 are contracts between Microsoft and major computer manufacturers. The other parties to those contracts have a keen interest in keeping them confidential vis-ˆ -vis their many aggressive competitors, who would be more than anxious to know the details of their contractual arrangements with Microsoft. Exhibit 28 is a key strategy document that describes in detail Microsoft's current marketing plans for Internet-related technologies. Disclosure of this document to Netscape and other Microsoft competitors would seriously compromise Microsoft's business in this area.

As the DOJ itself acknowledged at the October 27, 1997 scheduling conference, the documents contained in the Confidential Appendix are precisely "the kinds of things that might present a problem if they were disclosed" (10/27/97 Tr. at 17), and Microsoft supports the Court's suggestion that the burden should be on the DOJ to "show a basis for their being unsealed." (10/27/97 Tr. at 15.) The DOJ has made no such showing. As a result, Microsoft respectfully requests that the documents contained in the DOJ's Confidential Appendix remain under seal.

CONCLUSION

The DOJ has instituted a contempt proceeding that challenges conduct by Microsoft that (i) was known to the DOJ when the Consent Decree was signed, (ii) was explicitly contemplated by the Consent Decree, and (iii) is expressly permitted under the plain language of the Consent Decree. In addition, during the Tunney Act proceeding, the DOJ took the position that such conduct was permissible under the Consent Decree and that any effort to enjoin such conduct broadly would be contrary to the public interest. In short, there is absolutely no basis for the relief the DOJ is requesting, and its petition should be dismissed.

Dated: New York, New York
November 10, 1997

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, Richard C. Pepperman, II, hereby certify that on this the 10th day of November 1997, I caused true and correct copies of the foregoing Memorandum in Opposition to the Petition of the United States for an Order to Show Cause Why Respondent Microsoft Corporation Should Not Be Found In Civil Contempt, together with various supporting affidavits and declarations, to be served by hand upon:

A. Douglas Melamed, Esq.
Principal Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice
10th Street & Constitution Avenue, N.W.
Washington, D.C. 20530

and by overnight courier on:

Phillip R. Malone, Esq.
Antitrust Division
U.S. Department of Justice

450 Golden Gate Avenue
San Francisco, California 94102.

_____
Richard C. Pepperman, II

Edupage

Contents

MAC NETWORK COMPUTER

Apple will make new-product announcements that include a stripped down "network computer" called Macintosh NC, new models at the mid-range and high-end computer line, and a new PowerBook laptop. The Mac NC, which is expected to ship in the first half of 1998, will use database-server software from Oracle. Apple is also planning to begin selling its computers via the World Wide Web. (Wall Street Journal 7 Nov 97)

TEXAS SUES MICROSOFT OVER NONDISCLOSURE ISSUES

The state of Texas -- home to Compaq and Dell, two of the world's largest PC manufacturers -- is suing Microsoft for interfering with the state's antitrust investigation of Microsoft, and is angry that Microsoft is not releasing manufacturers from the "nondisclosure" clauses in their licensing contracts. The state attorney general says: "Microsoft's overwhelming market dominance intimidates computer markers whose very survival depends on having access to Microsoft's operating system software, which runs more than 90% of all personal computers sold today. Manufacturers are afraid to come forward with information because they can not do so confidentially." The Microsoft response: "We remain willing to discuss any accommodations that will adequately take into account Microsoft's concerns over the potential disclosure of its property... In the software industry, your code and the terms under which you license that code to others - those are the critical assets that any company has. We don't have tangible property. We don't have vast tracks of natural resources. What we have are ideas, intellectual property, and terms that we license. So making sure that there is adequate protection to that is very important." (New York Times 8 Nov 97)

JAPAN SAYS UNFAIR U.S. PRESSURE NIXED SUPERCOMPUTER DEAL

NEC computer corporation in Japan has asked the Court of International Trade to investigate whether pressure from the U.S. Commerce Department resulted in the failure of an agreement by the U.S. University Corporation for Atmospheric Research to purchase a $35.2 million NEC supercomputer. According to NEC, the pressure was intended to steer the purchase toward an American company, the Cray Research manufacturing unit of Silicon Graphics, Inc. (AP 7 Nov 97)

GERSTNER TO WALL STREET: GET ONTO THE NET

IBM chief executive Louis V. Gerstner Jr. told the attendees of a conference of security analysts: "Your entire industry will move to the Net. Not just the discounters; all of you will ... It's going to be a very bold move for any of the full-service brokers to break with tradition and throw themselves into direct online trading. But every day, they have to listen as their discount cousins tout low rates and 'round-the-clock access. I hope we'd all agree that the worst possible answer is to do nothing." (Wall Street Journal 7 Nov 97)

POWER/APPLE MERGER IN LOW GEAR

The merger of former Macintosh clonemaker Power Computing into Apple Computer has been delayed by a federal antitrust review that a Power Computing attorney thinks is just a ploy by U.S. attorneys to get evidence for their anti-trust investigation of Microsoft. (AP 6 Nov 97)

GRAVES FORMS LEARNING TECHNOLOGY RESEARCH INSTITUTE

Former Educom visiting scholar William H. Graves has left the University of North Carolina at Chapel-Hill, where he founded the Institute for Academic Technology, and has created the Learning Technology Research Institute, a nonprofit organization focused on software tools and instructional methodologies. The new Institute will be located near the Research Triangle Park area of North Carolina, and will have a strategic business relationship with Collegis, a provider of technology solutions to the higher education market. (UNC News 3 Nov 97)

CYBERSPACE ADVERTISING SOARS

The Internet Advertising Bureau says that Internet advertising revenue for the first six months of 1997 jumped to $343.9 million, an increase of 322% from the year-earlier period. The IAB survey also found that 86% of advertisers think that pricing based on the conventional system of cost per thousand is the best model for Internet advertising. (Toronto Financial Post 4 Nov 97)

SENATORS WANT TO KNOW PRICE TAG OF YEAR 2000 GLITCH

Senators Alfonse D'Amato (R., NY) and Bob Bennett (R., Utah) want to require U.S. companies to tell their shareholders how much they will have to pay to deal with the "Year 2000 Problem" that will cause old software coded with 2-digit "year" fields to miscalculate dates. To avert the problem, the old software needs to be recoded, at a national cost that the Gartner Group estimates to be $600 billion. Bennett says: "Every potential investor has the right those facts, and the burden must be on the corporation to disclose them." (USA Today 7 Nov 97)

CONFERENCE WEBCASTS -- BY POPULAR DEMAND

Because of the great popularity of the webcasts offered during the EDUCOM97 conference, Educom will maintain the keynotes for viewing "on-demand" now that EDUCOM97 is history. Viewers must have the RealMedia Player, version 5.0, available from www.real.com. The keynote speakers were Eli Noam, Sherri Turkle, and John Perry Barlow. Webcast site is www.educom.edu/conf/97/webcast.html.

WORLDCOM WINS MCI IN BIDDING WAR

WorldCom's offer of $51 a share, or $37 billion in WorldCom stock, has clinched the deal for its acquisition of MCI Communications, bringing to an end speculation over which of the three suitors vying for hand of the long-distance phone company would win out. British Telecommunications had early on declared its intention to purchase MCI, in which it already owned a 20% stake, and GTE had recently presented a $40-a-share cash offer. If the deal goes through, MCI-WorldCom, as the combined telecom titan will be known, will be a major player in the Internet, long-distance, and networking services arenas. (Wall Street Journal 11 Nov 97)

APPLE TO SELL VIA INTERNET

Apple will begin selling its systems over the Internet, allowing purchasers to have systems built to their individual specifications and delivered by UPS or Airborne. Interim chief executive officer Steve Jobs says that Apple's newest computers will use the new PowerPC G3 chip developed by Apple's alliance with Motorola and IBM. Jobs surprised industry analysts by not announcing a rumored deal with Oracle to develop stripped-down

"network computers," with Oracle offering the server software to support them. (New York Times 11 Nov 97)

REPORT ON TECHNOLOGY IN THE SCHOOLS

A report in Education Week magazine based on survey data collected by Market Data Retrieval on 55,000 public schools nationwide says that about 18% of those schools met its criteria for being considered a "high-technology school": Internet access, a computer network system, and a better-than-national average ratio of students to computers and CD-ROM drives." The states with the best averages were Alaska, Minnesota, Nebraska, North Dakota, and Wyoming. The study concluded, however, that was very little research available on how computers and other kinds of technology are actually being used by students, and what effect, if any, this technology is having on student achievement. (New York Times 11 Nov 97)

INTEL EYES CHEAP PC MARKET

Intel, in a strategic about-face, says it will begin manufacturing specialized chips that run PCs costing less than $1,000 and other information appliances. "What it means is we will have multiple products in multiple segments under one brand," says Intel CEO Andy Grove. Intel previously had focused on building ever-more-powerful microprocessors for high-end PCs, but now says it can produce variants of its Pentium II chip that can be incorporated into much less expensive machines. (Wall Street Journal 10 Nov 97)

INTEL CONFIRMS LATEST PENTIUM FLAW

An Intel spokesman has confirmed that a flaw in the company’s Pentium and Pentium/MMX processors has been discovered. The "F0 bug," as the glitch has been dubbed, involves a sequence of illegal opcodes -- instructions not normally intended for use with the Intel chips. "These opcodes are supposed to create an exception, where the processor raises a flag telling the program that something’s wrong," says one software expert. "This particular sequence, instead, causes a loop and locks up the processor." Users are unlikely to run into the problematic sequence by accident, he adds, saying it is more likely that the flaw was found by an Intel competitor looking for undocumented instructions on the chip. (EE Times 10 Nov 97)

MICROSOFT ASKS JUDGE TO DISMISS ANTITRUST LAWSUIT

Microsoft wants a federal judge to dismiss antitrust lawsuit filed recently by the Justice Department; the lawsuit accuses the company of violating antitrust laws by incorporating its Explorer software (for browsing the Web, handling e-mail, and performing other functions) into Microsoft’s Windows 95 operating systems rather than competing strictly one-to-one with standalone software (such as Netscape). Microsoft argues that the government has known for three years that Microsoft considered the software in question to be part of its operating system. (AP 11 Nov 97)

INTERNET FAX PAGES PEGGED AT 5.6 BILLION BY 2000

A Dataquest study predicts that the number of pages faxed through the Internet rather than over phone lines will reach 5.6 billion in 2000, up from 44 million this year. The migration from phone lines to the Internet will mean cost savings for businesses and lost revenues for long-distance telephone companies. (Investor’s Business Daily 11 Nov 97)

IBM INTRODUCES HIGH-CAPACITY DRIVE

IBM will begin shipping two new drives that use its breakthrough Giant Magnetoresistive (GMR) heads technology next month. The Deskstar 16GP will have a storage capacity of between 3.2 gigabytes and 16.8 gigabytes, and the second drive -- the Deskstar 14GXP -- will provide up to 14.4 gigabytes of storage. PCs with the new drives will be available in early 1998. The company eventually plans to make the GMR technology available in devices ranging from notebooks to IBM subsystems. "There is no reason why we wouldn't incorporate these advances into other systems," says an IBM VP. "This announcement is aimed at the desktop arena, but the entire family of hard disk drives will be incorporated into other products." (InternetWeek 10 Nov 97)

NEW TECHNOLOGY CREATES NEW RIVALRIES

The advent of new information technologies is pitting previously compatible businesses against each other, according to a survey conducted by Louis Harris Associates on behalf of Coopers & Lybrand. Examples of new rivals, all competing for a part of the information industry pie, include software developers, systems integrators, information providers and phone companies. (Investor's Business Daily 10 Nov 97)

LAWSUIT THREATENS NGI FUNDING

A lawsuit filed last month by a group of companies against Network Solutions and the National Science Foundation could prohibit the NSF from spending its share of the money allocated to the government's Next Generation Internet project. Congress recently authorized NSF to spend $23 million on the high-speed network, derived from a trust fund run by Network Solutions to promote the Internet's "preservation and enhancement." The company contributes about a third of all Internet domain name registration fees to the fund. A lawyer for the plaintiffs says the money already in the trust fund is now "subject to the jurisdiction of the federal court and must not be touched," but an NSF networking official told Senators last week that the money had already been transferred to NSF's account. NSF's general counsel says "at this time, we plan to follow Congress's directive." (Chronicle for Higher Education 14 Nov 97)

COMMUNICATIONS DECENCY ACT - IT'S BAAACK!!!

Senator Dan Coates (R-Indiana) has filed a bill to substitute for the Communications Decency Act (CDA) that the U.S. Supreme Court declared unconstitutional last summer. The new bill is more narrowly focused than the CDA, and is targeted strictly at impeding the flow of commercial pornography on the World Wide Web by requiring that commercial distributors of material that's "harmful to minors" restrict access by insisting on getting credit cards with personal identification numbers. Civil libertarian Daniel Weitzner of the Center for Democracy and Technology says:"I am very willing to recognize that there is a real problem and parents have real concerns. But this continued reliance on old-style censorship is not going to protect kids and will chill the expression of legitimate individuals and businesses. The Internet is coming together to address these problems ... It is premature to look for a legislative approach." Coates's response: "Every concern was given to tailor this legislation very specifically to the court's ruling. Although I think that many opponents of the CDA, who are feeling very heady, want to call it CDA 2, it is really very different. CDA cast a very wide net. This legislation hunts with a rifle. It goes after one specific area." (New

York Times 13 Nov 97)

DIGITAL SIGNATURE LEGISLATION INTRODUCED

A bill introduced in the House Wednesday would make government forms available online and allow citizens to use digital signatures to sign those forms. "By encouraging the broader use of digital signatures, it would also encourage the development of electronic commerce and the technology associated with it," says Rep. Anna Eshoo (D-Calif.), the chief sponsor of the Electronic Commerce Enhancement Act. Currently, only some government documents are available electronically and most government agencies do not accept digital signatures. (EE Times 12 Nov 97)

INTERNET TELEPHONY'S ADVANTAGES

The advantages that Internet telephony holds over regular wireline telephony go far beyond just offering price breaks. Using the Internet rather than conventional circuit-switched networks also provides a significant technological edge: "Originally, it seemed that the opportunity for Internet telephony was in arbitraging around regulator-imposed access charges, and that the window of opportunity would close as prices came down," says a senior manager at Andersen Consulting. "Now, we find that Internet telephony has a long-term cost advantage, based on much lower equipment costs. As players from the computer industry become involved, they're bringing a view on costs from their own, highly competitive business. We're basically talking about a communications network built on computer industry principles, not telco principles." (tele.com Nov 97)

ISP NUMBERS STILL GROWING

Despite predictions of an imminent shakeout in the Internet service provider (ISP) market, the number of providers has almost tripled in the past 18 months to 4,000. Industry observers say the increase is fueled by large increases in online users: "Access revenues will be growing rapidly because more people are getting online," says a senior analyst with IDC/Link. The number of online households is expected to rise to around 40 million by 2001, up from 13 million in 1996. (Investor's Business Daily 13 Nov 97)

COMPANY MARKETING PENTIUM BUG FIX

A small company called Freedom Fighter says it has developed a fix for the latest Pentium chip flaw. The F0 Fighter software is designed to work with Windows 95 or NT operating systems and detects and deletes the problem-causing code before it causes any damage. Meanwhile, Intel says it is still working on a fix, and expects to have some answers early next week. (InfoWorld Electric 12 Nov 97)

NADER JOINS ATTACK ON MICROSOFT

A conference put on by consumer advocate Ralph Nader is taking a look at the way Microsoft, "not content with its enormous market share in PC software, wants to hold our hand as we navigate the information highway, and to push us -- not so subtly -- toward its own partners and subsidiaries." One of the conference speakers is Microsoft-hater Scott McNealy of Sun, whose talk is entitled "No One Should Own The Alphabet." Microsoft refused an invitation to the conference, saying that it was stacked with rivals. Microsoft defender Tony Williams says: "Nader doesn't speak for consumers. He speaks for Nader. But certainly he is one

who is very media savvy and has an ability to cause heartburn to American corporations." (AP 12 Nov 97)

GTE: THE JILTED SUITOR THAT STILL PINES FOR MCI

Although its $40-a-share bid to buy MCI was shunted aside in favor of WorldCom's $37 billion $51-a-share bid, GTE hasn't given up. Apparently encouraged by a decline in WorldCom's stock, a GTE executive says that the original offer "is still on the table. We continue to believe a merger with MCI is a good strategic fit... but we also have an obligation not to overpay for these or any other assets." Industry analysts say that the WorldCom-MCI deal is a long way from closing. (Wall Street Journal 13 Nov 97)

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Who Decides What Innovations Go Into Your PC?

By Bill Gates
Chairman and CEO, Microsoft Corporation

If you asked customers who they would rather have deciding what innovations go into their computer - the government or software companies - the answer would be clear. They'd want the decision left to the marketplace, with competition driving improvements.

This is the question at the center of the Justice Department's recent action aimed at forcing Microsoft to remove Internet Explorer from Windows. In this instance, consumer benefits seem to be less important than the complaints of a handful of our competitors who want the government to help them compete - by preventing Microsoft from enhancing its products.

The Justice Department's position is equivalent to the government telling personal computer manufacturers that they can't include word processing, spreadsheet or email functionality in PCs because it would be unfair to typewriter, calculator and courier companies.

Microsoft and the DOJ anticipated this very issue three years ago when we signed a consent decree that specifically allowed Microsoft to develop "integrated software products." At the time, the DOJ was fully aware that we were planning to integrate Internet capabilities into the forthcoming Windows 95 operating system.

Microsoft has a long history of improving its operating system products and building in new functionality, just as Apple, IBM, Sun, Novell and others have. These features have included such things as a graphical user interface, memory management, type fonts, disk compression and networking. Every one of these was available first as a separate offering but eventually was integrated to meet customer demand for greater functionality in Windows.

Supporting Internet browsing in Windows is a logical, incremental step in the evolution of the operating system. For 15 years Microsoft operating systems have included as core technology the capacity to locate and use information from local sources - such as the hard drive or the CD drive - as well as remote sources, such as local area networks. Windows 95 simply permits users to get information from the newest remote source - the Internet.

When a PC manufacturer like Compaq, Dell or Gateway chooses to license Windows it agrees to ship all of the operating system, including Internet Explorer. Installing Windows 95 does not prevent OEMs from also shipping competing browser technology, such as Netscape's Navigator, and many hardware manufacturers do just that. PC manufacturers are free to differentiate their products from one another in many ways -- including by adding their choice of software products -- but modifying Windows is not one of them.

Internet Explorer is much more than just a "web browser." It provides important functionality that is the basis for other companies' new software products. Without a uniform Windows installation, end users could not be

sure of the performance of the integrated operating system and Microsoft could not stand behind its product. Furthermore, Windows would become Balkanized like the many incompatible versions of UNIX. This would eventually drive prices for PC products higher as software developers and hardware manufacturers would have to develop and test their products for all the different versions of Windows. And innovation would slow because developers would be reluctant to write new programs if they couldn't be sure that new features would be present on all Windows PCs. I doubt The New York Times would let a newsstand tear out the business section of the paper just because it wanted to sell more Wall Street Journals. Or that the Ford Motor Company would let its dealers replace a Ford engine with a Toyota engine. Microsoft has the right to preserve a consistent customer experience when using Windows.

Curiously, while the DOJ is claiming that Windows should not include browsing capabilities, Microsoft competitors are busy incorporating basic operating system services such as printing and running applications into their browsers, making them nothing less than an operating system. If our competitors can integrate an operating system into their browsers in the name of competition, why should Microsoft be forbidden to integrate a browser into its operating system? Enhancing Windows to support Internet standards more fully is not a frill - it is critical for Windows to stay competitive. Telling Microsoft that we can't improve Windows is telling us we can't compete.

Since its inception more than 20 year ago, the PC industry has grown incredibly rapidly and provided real benefits for customers without the government regulating product designs. Creativity and entrepreneurship are flourishing as hundreds of new software companies and thousands of new products come to market each year.

Microsoft Windows has played an important role in this innovation, largely because it serves as an open, integrated platform for software developers, hardware vendors and solution providers. This gives them the incentive and the certainty they need to build products for Windows, which attracts more customers and, in turn, encourages greater demand, more innovation and new products.

There is no question that consumers are the big winners. Today, you can buy a PC for under $1,000 that is more powerful than a PC that just a few years ago was three or four times more expensive. Prices for software are constantly falling too, thanks, in part, to the stable development platform provided by Windows. In the late 1980s, business productivity applications such as word processors or spreadsheets typically cost several hundred dollars each. Now, you can buy a full suite of far better productivity applications for about the same price. In 1990, CD-ROMs containing games, encyclopedias and personal finance software cost $80 to $200. Today, it's rare to see CD-ROMs for home users priced above $49.

And although Windows is by far the most popular operating system on the market today, the price has remained virtually the same for years while its performance has leapt forward. Unlike other operating systems, Windows will always be an open platform available at a reasonable price because that's the key to attracting new software development and giving customers the kind of low-cost, innovative PCs they want and have come to expect. A high-volume, low-cost approach works only as long as the platform remains open, so we have a vested interest in keeping it that way.

The PC has provided millions of workers with the tools to do their jobs better, empowered students to become lifelong learners, and enabled

consumers to enjoy exciting new forms of information, communication and entertainment on the Internet. In fact, the Internet promotes openness and competition more than almost any other invention of the last 100 years. The government should encourage the rich support for Internet standards that Microsoft is providing. The popularity of Windows does not create a chokehold on the Internet any more than a popular word processor chokes off free speech. Windows PCs allow people to browse the entire Internet easily. They allow anyone to become a publisher and to offer their goods and services to the global market at minimal cost and without anyone taking a fee.

U.S. antitrust laws do not exist to prop up competitors. The laws are intended to ensure that consumers benefit from the widespread availability of goods and services at fair prices, and that’s exactly what we have today. Microsoft spends more every year to improve the Windows operating system. This year we will spend more than $1 billion on R&D for future versions of Windows. Over the next several decades we will enhance Windows so that computers can talk, listen, see and learn, making it dramatically easier to get at the benefits of the Internet. The PC business will have an exciting future if the government does not hold it back by regulating product design.

A letter from William H. Neukom, Senior Vice President Law and Corporate Affairs, Microsoft Corporation to Sen. Orrin G. Hatch.

November 3, 1997

The Honorable Orrin G. Hatch
Chairman
Senate Judiciary Committee
Hart Office Building
Washington, DC 20510

Dear Chairman Hatch:

I write to respond to the concerns you recently expressed in the media about confidentiality provision in various contracts to which Microsoft is party.

The confidentiality provisions in these contracts are standard in the software industry, and indeed, in American Commerce generally. Confidentiality protection is particularly important in high technology industries, where the principal assets of a company typically consist of ideas, not any tangible asset. In most cases both parties to a high technology contract seek assurances from the other that confidential information will remain confidential.

Confidentiality provision used by many companies typically contain language providing that confidential information may be disclosed pursuant to judicial or other government order, provided the other party to the contract is given appropriate notice and an opportunity to object. The

purpose of the "notice" language is to give each party to the contract an opportunity to seek an appropriate protective order in court that would govern the disclosure and use of any confidential information. Some confidentiality provisions broadly state that confidential information may not be disclosed to any third party, without providing an explicit exception for information sought pursuant to subpoenas and other forms of compulsory process (although contacting parties obviously cannot trump compulsory process though such language).

I am enclosing examples of confidentiality provisions employed by Novell Inc. and Sun Microsystems, two leading software vendors, and an example of confidentiality language contained in a Microsoft contract. As you will see, the language in all of these agreements is identical in substance. I am also enclosing examples of confidentiality provisions found in two lawyers' "form books," Multimedia and Technology License Agreements: Forms and Commentary (1997) and Computer Law: Drafting and Negotiating Forms and Agreements (1997). Again, provisions of this nature are absolutely standard in the high technology industry. As I hope you will appreciate, such provisions are not directed at thwarting government investigations.

With regard to government investigations, you should be aware that Microsoft has cooperated fully with various investigations of the company undertaken by the Department of Justice since 1993. Four years ago, at the request of the Department, Microsoft informed the agency, in writing, that it does not interpret its license agreements with computer manufacturers with computer manufacturers as requiring a manufacturer to inform Microsoft of any dealings or discussions with the Department. Microsoft entered into this understanding with the Department on the basis of strong confidentiality protections provided by law for information supplied to the department - protection that the Department confirmed in writing to computer manufacturers. Microsoft further agreed that the department could show Microsoft's letter to any computer manufacturer that expressed concern about this subject.

That was the last Microsoft heard from the Department about confidentiality provision until last month, when the Department asked Microsoft to provide a new, updated letter that would apply more broadly to any party that signed a contract with Microsoft, not just computer manufacturers. Microsoft promptly provided the requested letter, and again, authorized the Department to share it with anyone. Thus, as of September 1997, Microsoft had fully complied with every request made of it by the Department on this subject.

Notwithstanding this history, the Department has now sought to raise an issue concerning confidentiality provisions in the context of the consent decree contempt proceeding that it recently initiated against Microsoft. The Department now claims that such confidentiality provision may have a chilling effect on the willingness of some persons to approach the Department with information concerning Microsoft, although Assistant Attorney General Klein has stated publicly that the Department is not aware of any instance in which such "chilling" has actually occurred. In view of the well-publicized and extensive nature of the many Department investigations of Microsoft, and the public statements by Mr. Klein's immediate predecessor, Anne Bingaman, the Department was open for business as a type of "Microsoft Complaint Center," it appears very unlikely that anyone would be reticent about speaking with the Department about Microsoft.

I hope this clears up any misunderstanding or misrepresentation about confidentiality provisions in the software industry. Please feel free to

contact me if I can provide any further information.

Sincerely,

William H. Neukom
Senior Vice President
Law and Corporate Affairs
Microsoft Corporation

Cc:
Senate Judiciary Committee Members
Mr. Joel Klein, Assistant Attorney General

A letter from Bob Herbold, Executive Vice President and Chief Operating Officer, Microsoft Corp. to consumerist Ralph Nader.

November 13, 1997
Mr. Ralph Nader
PO Box 19312
Washington, D.C. 20036

Dear Mr. Nader:

Like other Americans, I have long admired your commitment to the well being of consumers. The intensely competitive nature of the software industry has produced a steady stream of innovative new products, at attractive prices, that is unambiguously good for consumers. As a result, it is regrettable that you appear to have aligned yourself with a small band of Microsoft’s detractors whose apparent goal is to enlist the government’s assistance in their efforts to compete with Microsoft.

Your conference this week in Washington, D.C., "Appraising Microsoft and Its Global Strategy," might more appropriately be entitled "Microsoft: A Conclave of Critics." Virtually all of the speakers at the conference are either litigation opponents, leading competitors or well-known Microsoft critics. The conference makes no pretense of presenting an objective or balanced treatment of the issues. Moreover, you and your colleagues have already taken an aggressively hostile stance toward Microsoft in your public statements. This conference makes one wonder whether your speakers traveled by Qantas because it has all the hallmarks of a kangaroo court.

At last count, some 30 anti-Microsoft speakers filled your two-day agenda. You and your staff rejected our suggestions for several respected industry participants and observers who could have presented a balanced view of Microsoft’s business practices and products. For us to participate in this kind of an environment would be like walking into an ambush with sharpshooters on every hilltop. Furthermore, it would dignify an event that will inevitably devolve into Microsoft bashing.

For a supposedly pro-consumer conference, it’s interesting that you charged attendees $1,000, yet Novell earlier in the week was handing out free tickets to 40 of its closest friends. It’s also curious that the conference was advertised in full-page national newspaper ads costing upwards of $50,000 apiece. How is it that a non-profit operation like yours can find the money to finance such expensive advertising and marketing efforts on behalf of companies that compete with Microsoft?

Your premise that Microsoft has been a disincentive to competition and innovation is simply wrong. As an AT&T executive observed last year, the cost of computing has fallen 10 million-fold since the microprocessor was invented in 1971. That’s the equivalent of getting a Boeing 747 for the price of a pizza. If this innovation had been applied to automotive technology, a new car would cost about $2; it would travel at the speed of sound; and it would go 600 miles on a thimble of gas.

Meanwhile, American software companies provide over 600,000 direct American jobs and grew at seven times the rate of the U.S. economy from 1987 to 1994. That’s certainly not a portrait of an industry in decline due to lack of competition. In fact, the growth in jobs and decline in the cost of computing has been helped by the operating system technology in Microsoft Windows, which has enabled software developers and hardware manufacturers to develop thousands of compatible products.

It’s important that the public and journalists covering your event understand the extent to which you appear to have stacked the deck against Microsoft:

Your first session is entitled "An Overview of the Microsoft Strategic Plan and How They Accomplish Their Goals." The speaker is Gary Reback of the Palo Alto law firm of Wilson, Sonsini, Goodrich and Rosati. Mr. Reback is an outspoken opponent of Microsoft who is on the payroll of some of Microsoft’s most notable competitors. He represented an anonymous group of clients who attempted to intervene in a judicial review of Microsoft’s Consent Decree with the Justice Department in 1994. His challenge was firmly rejected by the D.C. Court of Appeals. PC Week has described Mr. Reback as a "headline-seeking lawyer," and he plainly has a significant personal stake in portraying himself as the savior of Silicon Valley companies in their competitive battles with Microsoft. Reback’s boss, Larry Sonsini, is on Novell’s board and owns 54,100 shares of stock.
The speaker for the session entitled "Microsoft and Increasing Returns" is Brian Arthur, an economist closely affiliated with Mr. Reback’s efforts to limit the vigor of Microsoft’s competitive efforts. Mr. Arthur was a major contributor to a paper submitted in 1994 by Mr. Reback on behalf of anonymous clients to the Antitrust Division of the U.S. Department of Justice. Mr. Arthur’s economic theories regarding Microsoft were recently described by Rich Karlgaard in The Wall Street Journal as "old and discredited. Mr. Arthur’s is a very bad argument. The scandal of it is that he can’t defend it himself, except as a tautology." The essence of Mr. Arthur’s theory of economic returns is that Microsoft’s success establishing Windows as a popular operating system for the PC had everything to do with luck and nothing to do with delivering a quality product that customers wanted. According to Mr. Arthur’s reasoning, millions of consumers the world over simply made stupid choices.

The speakers for the session entitled "Digital Commerce of the Future" are representatives of companies that compete with Microsoft Expedia and Microsoft CarPoint. These speakers are unlikely to be objective about one of their major competitors.

Your "keynotes" are being given by the CEOs of two of Microsoft's competitors, including Scott McNealy of Sun Microsystems. Sun Microsystems is a very large company with $8.8 billion in revenues and $747 million in profits last year. The subject of Mr. McNealy's speech - "No One Should Own the Alphabet" - is ironic. Sun is aggressively pushing its own proprietary standard, Java, which it hopes will compete with Windows, while wrapping itself in a half-hearted promise of openness. Just weeks ago, U.S. representatives rejected Sun's gambit to have the International Standards Organization shield Java from competition by designating it as an "open" standard while allowing Sun to continue to control the technology and the Java trademark. It's also important to understand that Sun's large Unix workstation and outdated minicomputer business model is under pressure from Microsoft's Windows NT, which offers far better price and performance for customers. Your second keynote speaker, Mitchell Kertzmaan, is CEO of Sybase, which competes with Microsoft in database products.

The speakers for the session entitled "The Theory of Increasing Returns and the Essential Facilities Doctrine" are both longstanding opponents of Microsoft. Garth Saloner is another economist who contributed to Mr. Reback's efforts to block Microsoft's proposed acquisition of Intuit. Morgan Chu of the Los Angeles law firm of Irell & Manell was lead counsel for Stac in its patent infringement action against Microsoft, and is currently counsel to AT&T in another lawsuit against Microsoft. It's hard to see how such a biased panel could actually shed any light on fair competition.

The speakers for the session entitled "Level Playing Field" are perhaps the most partisan of the entire conference. Roberta Katz is the general counsel for Netscape, which is locked in a competitive contest with Microsoft in the development and marketing of Internet-related software. Jamie Love, who works for you, has devoted virtually all of his time in recent weeks to stirring up controversy about Microsoft on electronic forums and offering a wide range of uninformed opinions regarding the legality of Microsoft's actions under the antitrust laws (even though he is not a lawyer, much less a lawyer with any antitrust experience.)

The second day of the conference begins with a session entitled "Government Antitrust Enforcement Activities." The speakers include Graham Lea and Christine Varney. Mr. Lea is a freelance writer who used to work for an English magazine called Computing. He has called Bill Gates "a spoiled brat," "boorish," and "immature," and Microsoft a company "that lacked ethical principles, that used sordid business practices." Your agenda lists Christine Varney as a former commissioner of the Federal Trade Commission. What you don't say is that she is now a paid consultant to Netscape. The suggestion that she brings the perspective of an antitrust enforcement agency is thus misleading.

The speakers at the session entitled "Perspectives of Software Developers and Users" cannot pretend to represent software developers who create products that run on Microsoft's operating system, or the users of any Microsoft products. Andrew Schulman is a journalist who testified as an expert against Microsoft in the Stac litigation. Rick Ross is a representative of the Java Lobby, which is a mouthpiece for Sun. Daniel Nachbar is director of the Public Software Institute. Your colleague, Jamie Love, is a board member of Nachbar's organization. None of these speakers is qualified to speak about the advertised topic. Moderator of the panel is Audrie Krause, director of NetAction, which has ties to some of Microsoft's most vocal critics. According to published reports, Krause recently received a grant from Sun Microsystems, the details of which neither would discuss. She also receives free legal assistance from a Washington, D.C.

lawyer who does work for Netscape and Oracle. While NetAction says it is a 501(c)3, it recently organized an anti-Microsoft lobbying day in Washington D.C.

The three speakers for the session entitled "Private Antitrust Enforcement" are all involved in antitrust litigation against Microsoft that is currently pending in Salt Lake City. Bryan Sparks is the CEO of a company called Caldera, which is owned by Mr. Noorda's family foundation. Caldera purchased the defunct DR-DOS operating system from Novell in 1996 and promptly sued Microsoft based on claims that purportedly had been assigned to Caldera by Novell. Those claims are identical to the allegations that were thoroughly investigated by the FTC and the Justice Department at Novell's behest between 1990 and 1994. A Forbes article quoted Sparks as saying: "We could have just purchased a license to DR-DOS, and that's originally what we were talking about with Novell, but by purchasing it outright, we got the right to litigate." Steve Susman of the Houston law firm of Susman Godfrey, and Steve Hill of the Salt Lake City law firm of Snow Christensen and Martineau, are both counsel to Caldera in that litigation. Obviously, Caldera and its lawyers will do nothing more than repeat the unfounded allegations of the complaint. Mr. Sparks evidently was so excited about being invited to attend your conference that he issued his own press advisory on PR Newswire announcing his participation.

The speakers for the last session, "Video, Telephony, Consumer Protection and The Future of Television" have all been vocal critics of Microsoft. Ed Black is president of the Computer and Communications Industry Association, an organization that sought to persuade the court to reject the Consent Decree agreed to by Microsoft and the DOJ in July 1994. Those efforts were ultimately unsuccessful when the Court of Appeals in Washington, D.C. ordered the lower court to enter the Consent Decree without modification. Philip Monego is CEO and president of NetChannel, which is closely allied with Oracle in its competition with Microsoft's Web TV.

Once the TV lights have been turned off and the reporters have packed away their notebooks, I hope you will take the time to seriously study the market dynamics that shape the computer industry. As a consumer advocate, you should want to support a market defined by strong competition that results in continually improving product quality and declining prices.

How dynamic and viable is the PC software industry today? There are 7,500 commercial software companies in the U.S. alone and more than 4 million developers worldwide for Windows. Hardly an industry on its knees. We did a study a few years ago that showed more than 500 new companies were formed each year because of Windows, and that number has undoubtedly risen since then. Interestingly, some of our most vocal opponents have built significant businesses and realized hundreds of millions of dollars of revenue annually as the result of the PC and Windows.

Yet Microsoft, though the most visible company in the industry, accounts for only 1 percent of total information technology industry revenues of $1.1 trillion. We account for less than 4 percent of total software industry revenues of $250 billion. Microsoft is not even the largest software company - $13 billion of IBM's $75 billion in revenues is in software, compared to our $11 billion.

As a consumer advocate, you know that any dialogue on competition needs to be focused on the consumer. When companies complain about the vigor of competition, that is typically a sign that they are having difficulty keeping up with the pace of innovation or remaining profitable in the face of declining prices. That doesn't mean, however, that consumers are

suffering. Nor does it imply that other companies have in any way misbehaved.

Rather than blindly supporting efforts by Microsoft’s large competitors to enlist the government to help them compete in the marketplace, I urge you instead to learn about our industry, which is at the center of America’s economic growth. Rather than trying to start an inquisition against Microsoft, I urge you explore the innovation and falling prices that have provided consumers with new products that improve the way we work, live and play.

Sincerely,

Bob Herbold

Executive Vice President and Chief Operating Officer

Jason’s Jive

Jason Sereno, STR Staff
jsereno@streport.com

Temujin
Windows 95 CD-ROM
Street Price: $49.95
For ages 13 and up

Southpeak Interactive
One Research Drive
Cary, NC 27513
tel 919-677-4499
fax 919-677-3862
www.southpeak.com

Southpeak’s new release, Temujin, is a supernatural adventure that is one of a kind. It is the first game ever to feature Video Reality. You interact with live characters and hundreds of puzzles in a brilliant 35mm

view. This first person also includes a original music score on three discs of gameplay.

Temujin is an adventure set in the present. Although the game is based largely on the past. You see, there is a great force inside the Stevenson Museum. The force that enslaved an entire continent is hidden somewhere among the artifacts of the great conqueror, Genghis Khan. The only thing you are sure of is the key to saving the entire human race has something to do with the Capricorn. It is a jeweled goat head that was used in the burial of Genghis Khan.

One thing that definitely sets this game apart from others is the use of Video Reality. Temujin is the first game to feature this cinematic marvel and the results are very pleasing. Not only are the cinematic sequences superb. The special effects, which are also a product of Video Reality, are excellent as well. The overall result is very nice.

All of the live characters are also a part of this new technique. The characters look as if they come straight of an actual movie. The actors portray their characters well and this 35 mm enhancement certainly adds to their portrayal. There are hundreds of puzzles that look very convincing as well. The jigsaw puzzles actually look as if they are made of cardboard. It seems everything in the game is real, this lets you immerse yourself into the adventure.

Musically, Temujin contains an original score that adds drama to this already creepy game. In fact, the overall sound effects really add dimension to gameplay. With every special effect their has to be a sound effect to compliment it. The sounds truly bring this game full circle.

I would recommend this game to fans of first person games. It may be too tricky for beginners because of the amount of puzzles within the game. I would also tell people to get a copy too see for themselves the brilliance of Video Reality. Temujin is a great buy and a great mystery to unravel.

System Requirements
IBM PC compatible Pentium 90 MHZ, Windows 95, 16 MB RAM, Double Speed CD-ROM Drive, 16 Bit
Windows Compatible Sound Card, 30 MB of Temporary Space on hard drive, SVGA Graphics for 640x480 High Color, 2 MB VRAM strongly recommended, Microsoft Compatible Mouse.

More things to come in the near future.

Put your Raybans on for Southpeaks’ MIB The game.We’ll bring in Psygnosis’ G-Police for questioning.Let’s get POSTAL with Ripcord Games.and will Constructor get Acclaim?!! And as always: Much, much more.

File Format for STReport

All articles submitted to STReport for publication must be sent in the following format. Please use the format requested. Any files received that do not conform will not be used. The article must be in an importable word processor format for Word 6.0 and/or Word Perfect 7.. The margins are .05" left and 1.0" Monospaced fonts are not to be used. Please use proportional fonting only and at Twelve (12) points.

- No Indenting on any paragraphs!!
- No Indenting of any lines or "special gimmickery"
- No underlining!
- Columns shall be achieved through the use of tabs only. Or, columns in Word or Word Perfect format. Do NOT, under any circumstances, use the space bar.
- Most of all.. PLEASE! No ASCII "ART"!!
- There is no limits as to size, articles may be split into two if lengthy
- Actual Artwork should be in GIF, PCX, JPG, TIF, BMP, WMF file formats
- Artwork (pictures, graphs, charts, etc.)should be sent along with the article separately
- Please use a single font only in an article. TTF New Times Roman 12pt. is preferred. (VERY Strong Hint)

If there are any questions please use either E-Mail or call. On another note. the ASCII version of STReport is fast approaching the "end of the line" As the major Online Services move away from ASCII.. So shall STReport. All in the name of progress and improved readability. The amount of reader mail expressing a preference for our Adobe PDF enhanced issue is running approximately 15 to 1 over the ASCII edition. I might add however, the requests for our issues to be done in HTML far outnumber both PDF and ascii. HTML is now under consideration. We'll keep you posted. Besides, STReport will not be caught in the old, worn out "downward compatibility dodge" we must move forward.

However, if the ASCII readership remains as high, rest assured. ASCII will stay. Right now, since STReport is offered on a number of closed major corporate Intranets as "required" Monday Morning reading.. Our ascii readers have nothing to worry themselves about. It looks like it is here to stay.

Many grateful thanks in advance for your enthusiastic co-operation and input.

Ralph F. Mariano, Editor
rmariano@streport.com
STReport International Online Magazine

Classics & Gaming Section
Editor Dana P. Jacobson
dpj@streport.com

>From the Atari Editor's Desk "Saying it like it is!"

I'm hard-pressed for time this week, so I'll be brief. What I do want to stress this week, however, refers to the first article below - the Atari Times Awards. If you haven't voted yet, grab the "ballot" below and do so! What better way to show your appreciation for some of the Atari community than to take a few minutes and vote. And if you've the inclination, drop a vote for one or more of our Atari staff here at STReport! Remember, folks such as Joe Mirando, Michael Burkley, and Albert Dayes have brought you a wealth of informative articles over the years; here's a way to show your appreciation for all of that work.

Until next time...

Atari Times Awards

From: "Colin Polonowski" <polonowski@zetnet.co.uk>

I've still only had a few votes, and it's only a few weeks to the voting deadline. If you are planning to vote please do it soon or you'll miss your chance. Please note that votes posted in this Newsgroup may go uncounted, therefore if you wish to vote please either use the Form on the AT Homepage,or send a private email to me with your nominations...

1997 Atari Times Awards

In order to pay tribute to those people who have supported the Atari scene over the last year, the Atari Times is launching the Atari Times Awards... All you have to do to vote is fill in the form on the Atari Times Homepage - http://www.users.zetnet.co.uk/polonowski/atimes/ - or email your votes on the categories below to polonowski@zetnet.co.uk

The biggest award is the 'Special award for services to the Atari community'. Before voting on this we think you should consider your answer very carefully. Voting will end on the 1st December 1997 so make sure you've made your contribution to the final results. The December issue of the Atari Times (UK) will be the first publication to print the results. After this a few other Atari magazines will be given access to the results for possible publication. If you wish to print the results in your publication then email Colin Polonowski at the address above.

The final results will also be made available on the Atari Times Homepage as soon as they have been confirmed, even if this is before the release of the December Atari Times. That's all you need to know, so go on and get voting...

Categories
´• Best Programmer of 1997
´• Best commercial release of 1997

´• Best Shareware release of 1997
´• Best PD/Freeware release of 1997
´• Best TOS game of 1997
´• Best Jaguar game of 1997
´• Best Demo of 1997
´• Best hardware add-on of 1997
´• Best Atari supporting company of 1997
´• Best non-profit making Atari organization of 1997
´• Best Disk Magazine of 1997
´• Best paper based magazine of 1997
´• Best Atari supporting web page
´• Best Internet Service Provider for the Atari range
´• Most exciting announcement for Atari owners in 1997
´• Best thing to happen in 1997
´• Worst thing to happen in 1997
´• Special award for services to the Atari community

This is similar to the lifetime achievement awards that are given out at things like the oscars. Should be someone who you feel deserves a significant amount of recognition for what they have done in the past for the Atari platforms. This person does no longer needs to be an active Atari supporter but they must have made a significant impact when they were...

Thanks to Neil Jones-Roadway, Steve Delaney, Joe Connor, Roy Goring, Mike Kerslake, Ronald J Hall, Andrew Whittaker, Greg George and You!
--
Colin Polonowski
http://www.users.zetnet.co.uk/polonowski

Have ICTARI, will travel...
From: G Greenway <augeas@elis.demon.co.uk>

Hello again,

I’m going to really start publicizing ICTARI properly now. For those who don’t know, ICTARI is a disk-zine / user group for Atari programmers. You can read, download and contribute to the zine on the WEB:

http://www.elis.demon.co.uk/ictari/ictari.htm

If you know any keen programmers not on the ’net, I’d be grateful if you could print this out and give them a copy. Why not take it to your local user group meeting ?

Thanks,
"Augeas"

=-=
I C T A R I   U S E R   G R O U P
G Greenway, 8 Denmark Road, Reading, Berks, RG1 5PA. 0118 756668
http://www.elis.demon.co.uk/ictari/ictari.htm
=-=

Dear Atari User,

Thank you for enquiring about the ICTARI programmer’s user group. This non-profit making group was set up in 1993 by Nick Bates and was then run by Peter Hibbs until the beginning of 1997. The group was set up for Atari

programmers to exchange ideas on software, solve programming problems, help beginners to programming, etc. We are open to all programmers of any ability, we have beginners and experts alike, in any language from machine code to Pascal.

We send out a disk magazine each month containing programming tips, source code in most languages, requests for help on software problems, useful programs for programmers etc, etc. The service itself is completely free, members send us a blank disk each month and the postage (or the cash equivalent) in return for next month's disk.

If you are an experienced Atari programmer, the group would very much value your programming expertise, however, this does not mean that we would expect you to provide programming articles, tips, etc, for each disk. If each member only contributes two articles a year we would have enough material to fill a disk each month, and if you decide to join the group we would hope that you could occasionally send in some contributions for the magazine. The sorts of material we try to publish are programming techniques, useful sub-routines, C functions, BASIC procedures, MACROs, etc, which would be of interest to other members. You may also be able to help other programmers with software problems and there may be other members who could help it you with a software problem that you have, after all, even experts don't always have all the answers.

If you are a beginner to programming or are just starting to learn a new language we can probably help with any software problems you have as we often run tutorials on various languages and programming techniques. If you have any programming queries, please send them in (on disk if possible) so that other members can hopefully provide a solution for you.

We trust that you will consider becoming a member of the group and provide some useful input to the magazine occasionally. If you are interested perhaps you would fill in and return the enclosed questionnaire to us at the above address. To receive the next issue you will also need to send a double-sided disk together with two 2nd class stamps or 75p cash for each month. Please return these as soon as possible so that we can place you on our mailing list for the next issue which will be despatched about the 15th of the month. The questionnaire and latest issues are also available from the ICTARI WEB page. Cheques or postal orders should be made payable to Mr G. R. Greenway. Back issues are also available for 1UKP each.

If you decide not to become a member we would be grateful if you would pass this letter and questionnaire on to someone who may be interested. We hope that you will agree to join the group, we are sure you will find something of interest on each disk and for just a few pence a month can you afford to miss out on the chance? We look forward to hearing from you in the near future.

QUESTIONNAIRE
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Surname: _____ First name: _____
Address: _____
_____
_____
_____
_____

I wish to become a member of the ICTARI user group and contribute to the magazine occasionally.

Do you agree to have your name and address published in the magazine ?
Yes [ ] No [ ]
Do you agree to have your telephone number published in the magazine ?
Yes [ ] No [ ]
Which languages do you program in ?
ST BASIC [ ] GFA BASIC [ ]
STOS [ ] Assembler [ ]
C [ ] FORTRAN [ ]
Pascal [ ] Other [ ] (specify)
What sorts of programs do you write ?
Games [ ] Apps [ ]
Graphics [ ] Utilities [ ]
Sound [ ] MIDI [ ]
Any [ ] Other [ ] (specify)
What items of hardware do you own ?
STFM [ ] STE [ ]
Falcon [ ] TT [ ]
Clone [ ] Emulator [ ]
HD [ ] Printer [ ]
RAM [ ] Other [ ] (specify)
(how much)

Please make any comments on the ICTARI user group below. Mark as private if not for publication.

Gaming Section

"Jet-Moto 2"!
"Newman/Haas Racing"!
"Consumer's Guide to Holiday Hits"
"Frogger" Returns!
And more!

Industry News STR Game Console NewsFile - The Latest Gaming News!

Frogger Leaps Onto Computer and Video Game Store Consoles

Hasbro Interactive Brings 1980s' Classic Arcade Hit To New Generation of Game Players

BEVERLY, Mass., Nov. 12 /PRNewswire/ -- FROGGER(R), the 1980s' blockbuster video game originally developed by KONAMI Co., Ltd. in Tokyo, returns to the gaming scene in full force this month in Hasbro Interactive's all-new 3D FROGGER for the PC and the PlayStation game console. The game has been widely predicted by gaming industry insiders to be one of the season's best-sellers since Hasbro Interactive and KONAMI first announced their plans earlier this year to revive and rebuild the classic.

"This is one of the games that started it all, so we knew we had to bring FROGGER back," commented Hasbro Interactive President Tom Dusenberry. "FROGGER has always had one of the most compelling game play patterns and that core element, combined with the interest in retro-gaming, made FROGGER a must from a development standpoint."

Hasbro Interactive has preserved many of FROGGER's classic elements so that twenty somethings who played the game well into the wee hours a decade ago can make an immediate, familiar connection and hop right into the action. But now, they'll also get to explore many levels of play in nine different immersive, 3D environments - FROGGER "worlds," leaping through highway traffic, hopping furiously from the mad lawn mower, or maneuvering through the alligator-infested swamp.

Sure to appeal to those who grew up with the original, the new FROGGER will also satisfy the appetites of a whole new generation of challenge-hungry gamers. The multi-frog race mode delivers split-screen action for up to four players on the PlayStation((TM)) game console or on a PC.

Hasbro Interactive also worked extensively for nearly two years to develop the FROGGER character under the license from KONAMI, using the best toy sculptors in the industry to create hard 3D prototypes that could eventually be animated. The result is a FROGGER with totally new, 1990s' abilities, from his super jump to the formidable power croak and heat-seeking tongue. Multiple original music scores, including the classic FROGGER music, keep players hoppin' for hours.

FROGGER first appeared as a popular arcade game in the early 1980s, produced by KONAMI. Hasbro, Inc.'s Parker Brothers partnered with KONAMI to develop the first in-home version of the game, which went on to become a huge success. Designed for the Atari and Commodore platforms, FROGGER was quick to leap onto Billboard's best-selling video cartridge game chart and won a number of industry honors, among them the Best Arcade Video/Computer Game Merit Award from Electronic Games Magazine.

Hasbro Interactive's FROGGER will be available beginning this month at a suggested retail price of $39.99 for both the Windows CD-ROM and the PlayStation(TM) game console. For more information on FROGGER check out www.frogger.com.

Jet Moto 2 Goes Where No Jet Bike Has Gone Before

FOSTER CITY, CALIF. (Nov. 11) BUSINESS WIRE - Nov. 11, 1997 - Sony Computer Entertainment America Inc. is giving gamers who are tired of the old racing standards the thrill ride of their lives with the introduction of Jet Moto(TM)2, the extreme all-terrain, high-speed and fast-action racing game that breaks all the rules -- available exclusively for the PlayStation(TM) game console.

The sequel to last year's top-selling game Jet Moto(TM), Jet Moto 2 has 10 new 3D race tracks, graphics and TruePhysics(TM) technology, which gives gamers the feeling they are riding an authentic power-packed jet bike. Unlike many other racing games, Jet Moto 2 isn't tied down to a set track, but features "free roaming" courses loaded with obstacles for riders to overcome and conquer.

"The TruePhysics technology incorporated into Jet Moto 2 gives gamers the unique experience of actually feeling the sensation of riding a real jet bike," said Peter Dille, senior director, product marketing, Sony Computer Entertainment America. "We have also complemented the impressive gameplay with seamless 3D polygonal graphics, that add incredible detail to the bikes, riders and landscapes."

Jet Moto 2 provides gamers with the freedom to race across various terrains like river rapids, national forests, deep caverns and canyons, roller coasters and more. Treacherous new obstacles include corkscrews,

waterfalls and bottomless pits.

Psygnosis Teams Up with Newman/Haas Racing for New Racing Game

FOSTER CITY, CALIF. (Nov. 11) BUSINESS WIRE - Nov. 11, 1997 - Psygnosis has signed a licensing agreement with the Newman/Haas Racing team to produce Newman/Haas Racing, a motor-sports racing game for PlayStation game console and PC CD ROM systems. The title is expected to be released for both platforms in March 1998. This pairing of the three-time CART (Championship Auto Racing Teams, Inc.) champions and the publishers of the international best-selling racing games Formula 1 and Formula 1: Championship Edition represents one of the most exciting alliances in motor-sports gaming. The title is set to feature the formidable pairing of Newman/Haas Racing drivers Christian Fittipaldi and Michael Andretti, in addition to a number of other licensed drivers and tracks from the world of CART.

"Psygnosis has enjoyed a great degree of success in the racing-games genre, and for our first American motor-sports title we're thrilled to be partnering with the Newman/Haas Racing organization," said Psygnosis Product manager Munir Haddad. "With their tremendous history, legendary drivers and winning attitude, they're a flagship motor-sports race team." The Newman/Haas Racing organization was co-founded in 1983 by former race-driver and noted team owner Carl Haas, and actor, team owner and race-driver Paul Newman. The team has won 52 Indy car events and three PPG titles, while driver Michael Andretti leads active-drivers in terms of wins, with 36.

"We're very excited to be involved with Psygnosis and their new game featuring our race team," said Carl A. Haas, team co-owner of Newman/Haas Racing. "Today's technology enables us to get more people involved with CART racing through interactive racing games such as this one. On track, we offer close, competitive racing and now we can offer additional hours of excitement through the game. Only a very small percentage of the world will ever be able to drive a racecar like we compete with in CART. Through the Newman/Haas Racing game we will provide the closest thing to driving a real race car."

Drivers also set to appear in the game include 1996 CART Champion Jimmy Vasser, Arie Luyendyk, winner of the 1997 Indy 500 and Robby Gordon (who will be racing in CART in 1998). With negotiations on going, around 15 licensed drivers are planned for inclusion. Eleven licensed tracks are planned with well known locations like the Milwaukee Mile, Road America, the Rio 400 and Laguna Seca all confirmed to appear, plus, new to CART in 1998, the Texaco Grand Prix of Houston. The game will feature a varied selection of 'oval', 'street' and 'permanent' race tracks, plus the 'Firebird' test track. ABC/ESPN commentators Danny Sullivan and Bob Varsha will provide commentary.

Newman/Haas Racing is the first product from new developers Studio 33, who were founded by former Psygnosis Director of Software Development, John White. An avid racing enthusiast himself, White has assembled a team of like-minded race fans who were introduced to the world of American motor-sport when then-reigning Formula 1 Champion, Nigel Mansell, raced in the U.S. during the 1993 and '94 seasons (ironically for the Newman/Haas Racing team, for whom Mansell won the 1993 PPG Cup). Studio 33 personnel visited with Newman/Haas Racing earlier this year, where they met with team engineers and gathered invaluable research data.

MGM: WAR is not a GAME

NOV 12, 1997, M2 Communications - Missiles are set to fly in April ’98 with the simultaneous release of WarGames for PlayStation and Windows 95, two ballistic salvos from entertainment super-power MGM. Featuring fully 3D landscapes and units with the ability to pan, rotate and zoom - all presented in glorious high colour and high resolution SVGA display - WarGames is the most advanced, real-time, 3D battle simulation to be created to-date. Its AI, route finding and flexible camera perspective all blend perfectly to provide the next generation in addictive wartime gameplay.

With over 100 types of fully controllable land, sea and air units, variable weather effects and a hard-hitting orchestral CD soundtrack, WarGames really is going to be an all-new war experience for PlayStation and PC gamers in 1998. 30 campaign driven single player missions - each with unique landmarks and detailed scenery - create an addictive experience when played solo, but WarGames offers even more playability with its completely original two-player split screen option and full multiplayer compatibility over a network, serial link, modem or Internet for total global domination.

The campaigns and dialogue have all been scripted by the writer and director of the original motion picture and all the main characters are also present ensuring a consistent and pertinent style. As in the film, hacking plays an important role by allowing the player access to cash, vital information and power-ups. Continuing the story twenty years after the events of the original motion picture, David Lightman (played in the film by Matthew Broderick) has now been employed by the U.S. government to help reprogram the WOPR (War Operations Planned Response) to ensure there will never be a repeat performance of the events that unfolded in the 1983 cinema hit.

Working undercover and being a real games player at heart, David buys out Protovision Inc. (the games company from the film) as a front to make the WOPR and., more importantly, its scenarios available to the on-line gaming community. Who better to challenge the computer at its games than the experienced gamers of the world? However, the WOPR breaks through David’s carefully constructed security programmes and lays down the gauntlet for a WarGames challenge. This situation presents the player with a series of increasingly difficult scenarios where they face the WOPR and its forces - but is this really just a game or does the WOPR have a much more sinister agenda? WarGames is being developed by Interactive Studios and will be published by MGM for the PlayStation and Windows 95 in April 1998.

Rascal Brings Many Firsts to PlayStation in 3D Platformer

SAN FRANCISCO (Nov. 12) BUSINESS WIRE - Nov. 12, 1997 - Action Platformer Zips Along at 60 fps, Displaying Deft Graphic Touches Like Real Time Environmental Texture Mapping Action-packed 3D platform game Rascal(TM) brings new advances in graphics technology and a Jim Henson Creature Workshop-created character to the PlayStation(TM) game console in March ’98. Developed by platform-gaming specialists Travellers Tales (responsible for console hits Mickey Mania and Toy Story, plus Sega’s upcoming Sonic R), this time-travelling adventure features an incredible array of special effects including real-time environmental texture mapping, plus true 3D gameplay, running at 60 frames per second, a first for the 3D platform genre on PlayStation.

"We believe Rascal is the most technically advanced 3D platform game on the PlayStation," notes Psygnosis Product manager Robin Kausch. "Travellers Tales have applied their wealth of experience in this area to create a very

polished product, and gamers will be amazed at numerous clever touches and graphic innovations." The Rascal character was created in collaboration with the world-renowned Jim Henson Creature Workshop in London. He's the misbehaving son of an inventor, who aims to rescue his kidnapped Father and takes a spin in the prototype time machine. Travelling through six worlds in three different time zones, he observes subtle (and not so subtle) changes in the environments along the way.

As the developers explain, "There are six different zones: The Castle, Aztec, Western, Galleon, Atlantis, and the Lab where the story begins. Each zone encounters different obstacles and problems, while also having a past, present and future. For example, the Galleon of the past is a working Pirate Galleon caught in the middle of a battle. "The Galleon of the present is a sunken wreck at the bottom of the sea, with sharks and sea creatures, while the Galleon of the future is found in a desert, half buried in the sand from post apocalyptic storms that have ravaged the earth." Thus gamers may explore a level on foot in one time period and then swim through it for an all-new perspective. The game features incredibly fast loading times for what developers describe as a "classic cartridge feel," and a host of enemies both big and small inhabiting spectacularly realised, hazardous 3D levels. Gamers will have to avoid fiendish traps and hostile creatures, while solving puzzles which will reveal hidden time bubbles, new levels, and bonus games.

IDSA Releases First Annual 'Consumer's Guide to Top Entertainment Software

WASHINGTON, Nov. 11 /PRNewswire/ -- Releasing its first annual 'Consumer's Guide to Holiday Hits' list of top entertainment software available this holiday season, the Interactive Digital Software Association (IDSA) reported today that video and computer game sales are headed for a record-breaking year in 1997 with sales for the first nine months of the year already surging 35.7 percent over the previous year.

"All signals are now pointing to total entertainment software sales breaking the $5 billion barrier," said Douglas Lowenstein, President of the IDSA, the trade body representing the U.S. video and computer game industry. "And this holiday season will be exceptional not just for the booming sales, but the array of games appealing to all ages, genders, and interests. In fact, as our 'Consumer's Guide to Holiday Hits' reveals, there is literally something for everyone being introduced this year. From sports to simulations to story games, publishers are sending an incredibly wide variety of titles to store shelves and the Internet."

Citing data compiled by the NPD Group from its Interactive Entertainment Software Service, Lowenstein said that January through September sales of video game software were approximately $1.5 billion and sales of PC entertainment software were approximately $979 million. NPD reports that the fastest growing genre categories for PC games were compilations/trivia, strategy, and sports, and for console games were action, strategy, and puzzle. And with more than 50 percent of total industry sales historically occurring in the fourth quarter, the industry is on target to sell more software than ever before.

Lowenstein said it is especially gratifying to see the market for entertainment software continue to broaden and deepen. According to the IDSA's recent annual consumer survey, fielded by the custom research division of the NPD Group, video game users are almost evenly divided between people under 18 (53.5%) and adults 18 and older (46.5%), while 72.8 percent of people playing PC games are 18 and over, and half of those are

36 or older. The data also shows that women make up more than one-third of the most frequent users of interactive entertainment software. "Video and computer games are no longer only for kids," said Lowenstein. "The IDSA's recent annual consumer research, the most in-depth study conducted of entertainment software users, offers a compelling explanation for the wide range of titles now on the market -- the fact that video and computer games are used by people of all ages and genders."

The IDSA's 'Consumer's Guide to Holiday Hits' highlights what publishers expect to the be the top-selling products this holiday season. Following each entry in parentheses, where available, is the rating for the title issued by the Entertainment Software Rating Board, the nation's premier interactive entertainment software rating service. The industry created the ESRB, which provides age and content ratings, to ensure that consumers, and especially parents, have the information they need to make informed purchasing decisions. Offering a "Parents Guide to Interactive Entertainment Software Purchases," the ESRB has been praised by Members of Congress, national consumer groups, leading academics, and leading children's advocates. For a copy of the guide or more information, please visit the ESRB web site located at http://www.esrb.org.

The Interactive Digital Software Association (IDSA) is the only U.S. association exclusively dedicated to serving the business and public affairs interests of companies that publish video and computer games for video consoles (such as Nintendo 64, Sega Saturn, and Sony PlayStation), personal computers, and the Internet. The Association's members include the nation's leading interactive entertainment software publishers, representing more than 80 percent of the U.S. market. In addition to presenting the E3 Expo, the world's largest and most prestigious interactive entertainment trade event, the IDSA serves as a leading source of industry information and survey data. The IDSA also conducts a worldwide anti-piracy program and works with the U.S. government at all levels on policy issues such as copyright protection and Internet regulation. For more information, please visit the IDSA web site located at http://www.idsa.com.

Christmas Will Be Gold for Games

ZDNet News (November 12, 1997) - Pundits predicting the primacy of computer games over traditional video games are not going to be pleased this Christmas. According to studies released by the interactive entertainment industry, video game revenues are expected to outpace PC game revenues by more than 50 percent. "This will be a banner year for the U.S. video game industry," said Ed Roth, president of the Leisure Activities Tracking Service for The NPD Group, a marketing information company. Roth believes the video game market will hit $5.2 billion this year, compared to $3.7 billion in 1996.

According to NPD estimates, total sales for video games in the first three quarters of 1997 topped $1.5 billion -- up 60 percent over the same period in 1996. PC games have grown only 10 percent, to reach $979 million. "Last year, PC and console title sales were neck and neck," said Jennifer Doyle, an analyst at media and information industry watcher Cowles/Simba Information. "This year, console games are looking to blow by the PC games." A Cowles/Simba report predicted that the interactive entertainment industry would grow from $5.5 billion in 1997 to $11.6 billion in 2001.

Both Playstation and Nintendo 64 have had more than a year to create a solid software base. This Christmas it pays off. "Both consoles have really hit the consumer price point, the economy is strong. ... There

really are a lot of ways to look at their success," said Ryan Brock, an analyst at the NPD Group. Many industry experts watched PCs catch up to, then pass by, consoles in terms of graphics power, and expected that sales would follow. But it's a little bit more complex than that, said Brock. "It's hard to compare a $2,000 machine to a $150 player," he said.

Yet the two are coming closer every year. In August and September, sub-$1,000 PCs made a big splash in the computer industry. Although not graphics powerhouses, the machines can play today's games at a respectable pace. In addition, as the PC has shown, graphics improve faster on an upgradeable machine. Before a falling out with graphics chip maker 3Dfx Interactive Inc., Sega's next console -- due to ship in late 1998 -- was designed to use 3Dfx's newest chip. The chip -- now called the Voodoo 2 -- will be available to PC users on boards starting in March, almost nine months before the first console hits the shelves.

Can consoles overcome the disadvantage of being hard-wired? Possibly, say analysts. "There always is the chance that the next-generation consoles will be expandable," said Brock. Rumors are that Sega's next console will run a version of Windows. If so, video-game consoles may stay on top for a long time to come.

Must History be ALLOWED to REPEAT Itself?
STR Spotlight

Austrian watchdog tracks neo-Nazis on the Web

Neo-Nazis are sidestepping national borders by communicating in cyberspace, using the Internet to swap information and spread their propaganda. "Did Six Million Really Die?" asks a headline in a Web site run by Ernst Zundel, a Toronto-based revisionist who denies the extent of the Holocaust. Sites like his, easily accessible to Web surfers, are particularly disturbing to European governments, whose strict anti-Nazi legislation is being circumvented by groups publishing hate diatribes on the Internet from providers in the United States and Australia.

In Austria, The Documentation Center of the Austrian Resistance is the top monitor of national extremist activity. The center, which works in close association with Nazi-hunter Simon Wiesenthal, is now responding to cyperspace xenophobia and denial of World War II Nazi atrocities. The watchdog agency has set up its own Web site in order to inform the public and combat computerized rightists more efficiently:
http://iguwnext.tuwien.ac.at/doew

"This is new territory for us," Wolfgang Neugebauer, head of the center, said. It has just published a book, "Das Netz des Hasses" ("The Net of Hate"), in which 15 contributors take stock of online international revisionist, anti-Semitic and neo-Nazi material. Though the Web offers a new vehicle for radicals, German-language Web pages are mainly recycling standard propaganda, Neugebauer said. "We are dealing with familiar content. In Austria, the same people and groups we have observed printing neo-Nazi propaganda material in the past are at work. Currently the

intellectual level is very low."

AUSTRIAN, GERMAN NEO-NAZIS WORK TOGETHER

Against the backdrop of a common language and an ideological alliance that culminated in Adolf Hitler's Third Reich, Austrian and German neo-Nazis can now comfortably communicate through computer networks. Neugebauer's book cites the "Thule-Netz" as the biggest thorn in the side of German authorities. About 150 neo-Nazis are believed to maintain contact through this electronic bulletin board, forming an extremist "virtual community." While a Thule Web site is accessible to the public, a system of passwords restricts its inner chambers to select members.

Neo-Nazis made use of the Internet and mobile phones in an attempt to coordinate rallies in Germany marking the 10th anniversary of Nazi veteran Rudolf Hess's death last summer. Although some argue that the amount of propaganda on the Web is slight compared to the bulk of miscellaneous information transmitted every day, Neugebauer warns of its increasing global reach: "This has dynamic potential. ... Neo-Nazis are communicating across borders. They will stop at nothing." According to a new U.S. Anti-Defamation League publication, the number of hate sites on the Web has doubled to approximately 250 since last year. American white supremacy sites such as "Stormfront" or "Aryan Nations" include handy links to like-minded European radicals.

LANDMARK CASE AGAINST ZUNDEL

Most hate literature published on the Internet through U.S. providers is protected by liberal legislation. For Austrian Neugebauer, freedom of speech is a cultural issue. "The United States has not experienced National Socialism and genocide. It can afford to be tolerant. Austria and Germany cannot," he said. In what is seen as a landmark case, however, Zundel is on trial before the Canadian Human Rights Commission for allegedly masterminding the Web site. A manifesto on the site seeks to play down the magnitude of the Holocaust extermination of Jews.

"There is growing credible evidence that what purport to be the remains of gas chambers at Auschwitz and elsewhere are frauds. They're less believable than Potemkin villages," it further states. While Austrian law allows for the elimination of neo-Nazi propaganda from domestic servers, court action is difficult if Austrian based radicals use an overseas server. "But if we can prove authorship.. for example; through textual analysis, we can then initiate legal proceedings," Neugebauer said. "Our aim is not preventive censorship but the penalization of Nazi propagandists."

PEOPLE... ARE TALKING

Compiled by Joe Mirando
jmirando@streport.com

Hidi ho friends and neighbors. Well, as the holidays get closer and closer we're bound to hear more about all the neat things available on other platforms that will be coming out just in time to be given as gifts. Now I'm not poking a finger at anyone in particular but this time of year has always turned me cold as far as computer-related offerings are concerned.

While there's really nothing wrong with this, something just seems a bit odd about it. I've always seen hardware and software as something that the user should buy. After all, they are the ones that know what they want, need, and most importantly, can use. There are 'safe' gifts of course, but exactly how many Star Trek mouse pads can you use? I mention that only because I picked up a really cool one for myself the other day. It's got a 3-D view of the original Enterprise ("No Bloody A, no bloody B, no bloody C, no bloody D") and several Klingon battle cruisers all firing back and forth. As you move, the scene evolves. While the mousepad caught my eye quickly in the store, I find it irritating as heck now that it's on my desk. I have trouble concentrating on what I'm doing on the screen because, as I move, out of the corner of my eye I can see something moving.

I've been told by several people that I should just not pay attention to it. Easier said than done. It's one of those things you really have no control over. I guess I've always been one of those people who catch the little things and store them away for future reference. Although some may say that this is my most annoying trait, they really don't know me well enough... I have so many other traits that are even more annoying than that. <grin>

This particular trait though, has helped me keep perspective as I navigate through the hordes of folks who simply must have the latest and greatest. There's nothing wrong with having the fastest, most modern computer available, and if I was to buy a computer today, I'd probably 'shoot the moon' and get the top of the line model. But while that puts me in the same category as most computer buyers, I fully understand that no matter how fast or memory-laden a computer I buy, it will be overshadowed by another model within a year. There will be things that newer models can do that this machine will not, and I'll have to upgrade in one way or another if I wish to take advantage of new features.

Meanwhile, I sit here typing away on my Atari. Outdated? Yes. Overshadowed by newer computers? Most definately. But, while it is true that there are things that I cannot do that others can, they are of little consequence to me at the moment. I don't feel the need to take advantage of PUSH technology (or to be taken advantage _of_ by it), or to have the text that I'm writing now available to me in any one of 16 million colors. One interesting thing I've found about computer advancement is that, the older the computer is, the slower the rate of overshadowing. For those of you

scratching your heads and wondering what I'm talking about, let me explain. A computer you buy today will be overshadowed quite quickly by newer models. While it is true that our Ataris are also falling behind, they are _so_ far behind in the eyes of the rest of the world that a few more "can't do that"s don't add up to all that much. I've got all I need right here... text editing, spell checking (thank goodness for that one), telecommunications, internet access, CD ROM capability, and many other things that don't come to mind right now (mostly because I'm busy using my text editor and spell checker while cruising the internet and listening to my favorite music CD through the computer <grin>).

Yessir, I've got CAB 2.5 on order for myself as a Christmas gift, and that'll make me happy for a while... until I get the bills for the gifts I bought for everyone else! Well, let's take a look at what's going on in the newsgroups.

>From the COMP.SYS.ATARI.ST NewsGroup

When Gary Priest mentions that he just purchased CAB 2.5, Daniel Dreibelbis asks him:

> So CAB 2.5 is actually OUT? In ENGLISH? That's VERY interesting news, Gary! Tell us all about it! Did it come with a manual or are you having to wait just like I did when I bought CAB 2.0a from Systems Solutions in April? What upgrade paths are they offering?
>
> Something tells me chro_Magic is going to be getting in contact with me RSN (I'm on the North American waiting list, you see) <smile>"

Gary replies:

> "I believe it only came out in the last couple of days. But yes, it was on sale at the London show, and yes I bought it :) It comes with the English manual (that apparently was the delay). CAB2 has always had an English .rsc file all the way through it's development (I know 'cos I beta test it). It's just the manuals that cause the delay.
>
> Basically, I bought CAB2.5 from System Solutions for 24UKP (that is the price if you have already registered 1.5 via Interactive).
>
> I'm not sure what upgrade prices are. You'd be better off emailing System Solutions and asking them: sales@system-solutions.co.uk
>
> Hmm. No idea. Don't even know what it (chroMAGIC) is.

For anyone else who doesn't know, chroMAGIC Software Innovations is taking pre-release orders here in The States for CAB 2.5 and has done a fair amount of hand-holding for those who just get a little lost with a new program like CAB... That's where I've got my copy of CAB 2.5 on order. <grin>

Austin Walshe asks about configuring HSModem7, the serial port fixer-upper program for all Atari computers:

> "I am currently attempting to set up my TT modem port 2 to run at 28800 bps (or higher?). I have set up HSModem7 but are

having trouble configuring it using setter.ttp to obtain the higher transfer rate. Sketchy German documentation doesn't help! If any one knows how to configure HSModem please let me know."

Raymond Collins tells Austin:
"The following are settings I use with HSMODA07 on my TT030, TOS 3.06. These settings are enfluenced in part by the use of STalker v 3.05, CoNnect v 2.46, and Geneva v 1.0 rel 005.

I also use a Cyrel Sunrise M16-1280 graphics card and some of the serial drivers and graphic drivers influence the modem and serial ports. Also serial timing is effected by my TT's CPU being modified to 48Mhz with a CaTTamaran.

Program order DRIVN, MFP, SCC, MFP_TT, and [RSVX (from HSMODA02)].

I use the SETTER.PRG to modify my settings, this program came with hsmoda06.

```
  DRIVN.PRG
FASTINT  - off
EXOPEN   - on

  SCC.PRG (I now use ESCC.PRG)
M2TT   -  u
M1IMU  -  off
LANBIT -  on
LANEXT -  on
LAN_S2 -   1
DTRM2  -  on
DTRS2  -  on
M2DR1  -  off
RBLM2  -  64
TBLM2  -  64
RBLS2  -  64
TBLS2  -  64

   MFP.PRG
RSVE   -  on
REPL   -  set all six of these to "u"
DTR    -  on
RBL    -  32
TBL    -  64

 MFP_TT.PRG
RSVE   -  on
REPL   -  set all six of these to "u"
RBL    -  32
TBL    -  64
```

Some tips:
1) In the drvn.prg turn fastint off.
2) scc.prg or escc.prg can not use TT RAM.
3) set mfp and mfp_tt transfer buffers only to 32k for STalker's use.

4) set STalker's file transfer buffer to 1/3 that of mfps for write verify timing slack during HD file transfer

dumps.

5) Higher modem speeds are remapped through lower settings into Atari's MODEM.CPX. This information is described in SCC_X.TXT, in both English and German.

6) When in doubt contact the authors of each program involved (they helped me STalker, Connect, and hsmoda06)."

On the subject of using STinG, the TCP/IP connection package by Peter Rottengatter, Joerg Sprenger asks for help:

"I've got some major problems, using the Sting-Distribution to connect to the web via compuserve. I suppose, the main reason ist, that MODEM1 (I'm usin'a POWERBOOK with MM 1.25) is set to 8N1 instead of 7E1, which is expected by compuserve. After setting these parameters in serial.cpx to 57600 7E1, activating sting by sting.internals.cpx, starting dialler and quit it immidiatly, the serial.cpx shows a changed MODEM1 to 57600 8N1.

I know, that PPPCONNECT uses 7E1 for compuserve, because while using 8N1 I've got only unreadable signs, but no valid PPP-connection.

So, could somebody confirm to this exspiriences, or better lead me to a solution, using STING correctly for compuserve and t-online?"

Jean-Michel Mercier tells Joerg:

"I have exactly the same problem. I think that the only way is to use another program to get thru the login procedure and jump to STING's DIALER when the "One moment please..." sentence appears.

I don't know if terminal emulators that do scripting exist on ST (such as TELIX or PROCOMM and so) do on PC ? But I think that I will write a small GFA program for this purpose very soon.

But for the moment, you could try to experiment like I do : using e terminal Emulator (the standard VT52 accessory for example) to dial and log into CIS and switch to the dialer then."

Peter Rottengatter tells Joerg:

"So PPP-connect does a PPP connection using 7E1 ? I find that really hard to believe. The PPP RFC states clearly that an 8 bit connection is required, and that is completely obvious from the fact that PPP uses many control characters above 127, therefore actively using the 8th bit that won't exist in 7E1.

Some guy in the Maus-Gruppe "Internet" (maus.sys.atari.internet) posted his setup that he uses to log into T-Online."

Actually folks, it is true that CompuServe requires a 7 bit connection when you are giving it your account name and password. I don't remember _why_ CIS requires this, but it does. There is, however, a way around it. Simply edit your dial-up script so that

when CIS sends the string "HOST:" instead of replying CIS (or CSI, or CompuServe, or whatever), simply add a plus sign (+) to the front of the string (so it would become "+CIS", "+CSI", or "+CompuServe"). Of course, you'll have to do this with WAIT statements since STinG won't be able to see the "HOST:" prompt in the first place.

Claude Bourgoin asks:

> "Has anyone been able to get STing PPP working on a TT030. If you have could you email me a copy your default.cfg and dial.scr. I can get a successful Link Initialization, but I am unable to resolve any hosts."

Malcom Cooke tells Claude:

> "Sting Has always worked great on my TT. I also Use MagiC."

Andreas Sickert asks for help with jumping platforms:

> "I've got a problem. One year ago I changed the systems from Atari, which I used because I'm a music-teacher, to PC. I wrote many MIDI-Files with my ATARI and I don't want to loose them. Can anybody tell me, how I can transfer these files from my old ATARI 1040 STFM to my PC? I think that I can't use the floppy because of the different formats."

Robert George tells Andreas:

> "Actually a PC can read a Atari disc. The problem is that Atari uses a Single sided disc and the PC wants a double sided. So unless you have a drive on your Atari that is high density/souble sided my suggestion would be to put all your Atari midi files in a zip file and e-mail them to some one with a pc. Otherwise I'm out of suggestions. My solution was to buy a Floptical drive some years ago on my Atari that reads and writes high density floppies that pop right into my PC. The flopital drives work good but are only available used if you can find one. they also hold 20 meg on flopitical discs."

Well folks, that's about it for this week. Tune in again next week, same time, same station, and be ready to listen to what they are saying when...

PEOPLE ARE TALKING

EDITORIAL QUICKIES

ATTENTION: VIRUS ALERT VIRUS ALERT VIRUS ALERT

Federal Bureaucrat Virus -- Divides your hard disk into hundreds of little units, each of which do practically nothing, but all of which claim to be the most important part of the computer.

Dan Quayle Virus -- Their is sumthing rong with your compueter, ewe just can't figyour out watt.

Gallup Poll Virus -- Sixty percent of the PC's infected will lose 38% of their data 14 percent of the time (plus or minus a 3.5% margin of error).

Paul Revere Virus -- revolutionary virus doesn't horse around. It warns you of impending hard disk attack once if by LAN, twice if by C:

Politically Correct Virus -- never calls itself a "virus," but instead refers to itself as an "electronic micro-organism."

Ross Perot Virus -- Activates every component in your system just before the whole thing quits.

Mario Cuomo Virus -- It would be a great virus, but it refuses to run.

Oprah Winfrey Virus -- Your 2000 MB hard drive suddenly shrinks to 80 MB, then slowly expands back to 200 MB.

AT&T Virus -- Every three minutes it tells you what great service you're getting.

MCI Virus -- Every three minutes it reminds you that you are paying too much for the ATT Virus.

Ted Turner Virus -- Colorizes your monochrome monitor.

Arnold Schwarzennegger Virus -- Terminates and stays resident. It'll be back!

Government Economist Virus -- Nothing works, but all your diagnostic software says everything is fine.

New World Order Virus -- Probably harmless, but it makes a lot of people really mad just thinking about it.

Texas Virus -- Makes sure that it's bigger than any other file.

Adam and Eve Virus -- Takes a couple of bytes out of your Apple.

Michael Jackson Virus -- Hard to identify because it's constantly altering its appearance.

Congressional Virus -- The computer locks up, screen splits erratically with a message appearing on each half blaming the other side for the problem.

Airline Virus -- You're in Dallas, but your data is in Singapore.

Freudian Virus -- Your computer becomes obsessed with marrying its own motherboard.

PBS Virus -- Your PC stops every few minutes to ask for money.

Elvis Virus -- Your computer gets fat, slow and lazy and then self destructs, only to resurface at shopping malls and service stations across rural America.

Ollie North Virus -- Turns your printer into a document shredder.

Nike Virus -- Just does it!

Sears Virus -- Your data won't appear unless you buy new cables, a power supply, and a set of shocks.

Jimmy Hoffa Virus -- Nobody can find it.

Congressional Virus -- Runs every program on the hard drive simultaneously, but doesn't allow the user to accomplish anything.

Kevorkian Virus -- Helps your computer shut down whenever it wants to.

Imelda Marcos Virus -- Sings you a song (slightly off key) on boot up then subtracts money from your Quicken account and spends it all on expensive shoes it purchases through Prodigy.

Star Trek Virus -- Invades your system in places where no virus has gone before.

Health Care Virus -- Tests your system for a day, finds nothing wrong, and sends you a bill for $4,500.

George Bush Virus -- It starts by boldly stating, "Read my test....no new files!" on the screen, proceeds to fill up all the free space on your hard drive with new files, then blames it on the Congress Virus.

Cleveland Indians Virus -- Makes your 486/50 machine perform like a 286/AT.

LAPD Virus -- It claims it feels threatened by the other files on your PC and erases them in "self-defense."

Chicago Cubs Virus -- Your PC makes frequent mistakes and comes in last in the reviews, but you still love it.

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1 For example, the DOJ obtained a declaration from an executive at Micron who, although quick to say he was "not an engineer," opined-based on his "general understanding of the nature of the code and file structure of Internet Explorer and Windows 95"-that it would be "technically feasible to remove . . . the software code constituting Internet Explorer from Windows 95 without impairing the proper functioning of the

operating system." (Declaration of Eric Browning, dated Oct. 14, 1997, 7 (Ex. 5 to DOJ Petition)). Moreover, having been told that he was not "a technical person," the DOJ asked Packard Bell's vice president of marketing whether-based on his "basic knowledge of software"-it would be possible "to remove the Internet Explorer code from Windows 95 without affecting the functioning or performance of Windows 95." (Transcript of Deposition of Mal D. Ransom, taken Oct. 1, 1997, at 12-14 (Ex. 7 to DOJ Petition)). The DOJ apparently credited the uninformed testimony of these witnesses because the DOJ provided no other support for the demonstrably incorrect assertion that removing Internet Explorer from Windows 95 would have no adverse effect on the remainder of the operating system.

2 The Assistant Attorney General told this Court that she, "Anne K. Bingaman, reached the conclusion that there was only one case made out at that point in time against Microsoft. And I thought the other claims which these people have alleged, which we investigated, were not provable. . . . We had a licensing case, and we didn't have another case at that time." (Hruska Aff. Ex. B at 23.)

3 The Assistant Attorney General stated: "I didn't care what I sued them on. I didn't care. I'd sue them on vaporware. I'd sue them on anything if I thought I could win the case. But, your Honor, I didn't think I could win these other claims at that time. Now, if somebody comes to me with the evidence and shows me I can win it, hey, I sort of like suing these guys. . . . Your Honor, it would be the height of irresponsibility and abdication of my duty to sue people when I didn't believe in my best good faith as a lawyer of 26 and a half years and 20 years in litigation that I'm going to lose this case." (Hruska Aff. Ex. B at 27.)

4 As the DOJ told this Court during the Tunney Act proceedings, "we don't think it's fair to [Microsoft] to be in the position where their presumption of innocence in a sense has been reversed, where there is an obligation for them without really a chance to cross-examine witnesses or the like." (Hruska Aff. Ex. C at 26.)

5 See also Browning Decl. 4 (Ex. 5 to DOJ Petition) (Micron's customers "overwhelmingly expect" the operating system preinstalled on their computers will be Windows 95); Transcript of Telephonic Deposition of Jerry T. Kozel, taken Sept. 19, 1997, at 11 (Ex. 6 to DOJ Petition) (IBM preinstalls Windows 95 on 100% of its consumer line of computers "based on the demands from [its] retailers and customers"); Ransom Tr. at 10-11 (Ex. 7 to DOJ Petition) (Packard Bell preinstalls Windows 95 on 100% of its consumer line of computers because it is "the only competitive available operating system that speaks to our marketplace in the world"); Transcript of Deposition of James J. von Holle, taken Sept. 19, 1997, at 12-13 (Ex. 8 to the DOJ Petition) (Gateway preinstalls Windows 95 on a large proportion of its computers due to the "market success" of the operating system); Transcript of Telephonic Deposition of Stephen A. Decker, taken Oct. 17, 1997, at 10 (Ex. 9 to the DOJ Petition) (Compaq preinstalls Windows 95 on 100% of its consumer line of computers because that is what the competition does and because that is what makes new computers easier to use "from a customer point of view").

6 Although they are beyond the scope of the Consent Decree, Microsoft's product design decisions are subject to whatever constraints might be imposed under the antitrust laws

generally. Recognizing that "[p]roduct innovation," particularly in high-tech industries like software, is "the essence of competitive conduct," Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 542 (9th Cir. 1983), cert. denied, 465 U.S. 1038 (1984), courts routinely reject so-called "technological tying" claims. See ABA Section of Antitrust Law, 1 Antitrust Law Developments 184 n.1008 (4th ed. 1997). To even begin to establish such a claim, an antitrust plaintiff must allege that the design of an integrated product was conceived solely "for the purpose of tying the products, rather than to achieve some technologically beneficial result." Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir. 1976). Courts have stressed that any other rule "would enmesh the courts with technical and uncertain inquiry into the technological justifiability of functional integration and cast unfortunate doubt on the legality of product innovations in serious detriment to the industry and without any legitimate antitrust purpose." Telex Corp. v. IBM, 367 F. Supp. 258, 347 (N.D. Okla. 1973), rev'd on other grounds, 510 F.2d 894 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975).

7 The DOJ's heavy reliance on the Competitive Impact Statement, which the DOJ drafted without any participation from Microsoft, is misplaced. The DOJ neglected to mention the existence of the proviso when discussing Section IV(E)(i) of the Consent Decree in the Competitive Impact Statement. Such efforts to diminish the significance of the proviso cannot alter the clear understanding that the DOJ and DG IV reached with Microsoft in July 1994.

8 Admissions contained in court papers are binding on the party who made them. See National Assoc. of Life Underwriters v. Commissioner of Internal Revenue, 30 F.3d 1526, 1530 (D.C. Cir. 1994); see, e.g., Simpson v. Washington Metro. Area Transit Auth., 688 F. Supp. 765 (D.D.C. 1988), aff'd per curiam, 1990 WL 104842 (D.C. Cir. June 5, 1990)

9 Accord Gates v. Shinn, 98 F.3d 463, 472 (9th Cir. 1996), cert. denied, 117 S. Ct. 2454 (1997); Hughey v. JMS Dev. Corp., 78 F.3d 1523, 1532 n.12 (11th Cir.), cert. denied, 117 S. Ct. 482 (1996); Harris, 47 F.3d at 1349; Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991); In re Baldwin-United Corp., 770 F.2d 328, 339 (2d Cir. 1985); H.K. Porter Co. v. National Friction Prods. Corp., 568 F.2d 24, 26 (7th Cir. 1978); cf. United States v. NYNEX Corp., 8 F.3d 52, 55 (D.C. Cir. 1993) (reaching same conclusion in criminal contempt context).

10 Modification of the Consent Decree would, in any case, require specific notice to Microsoft and an evidentiary hearing to determine whether such modification is necessary and appropriate. Western Elec. Co., 894 F.2d at 436-37.

11 As a result of the DOJ's unwillingness or inability to understand the facts surrounding Microsoft's inclusion of Internet-related technologies in Windows 95, the DOJ's papers are replete with inaccurate factual assertions. For instance, the DOJ asserts that what it defines as a "browser" is able to access information on the hard disk drive of a computer "without interacting with the underlying operating system on the PC." (DOJ Mem. at 31.) That statement is absurd and reflects a profound confusion about the nature of the relationship between Internet Explorer and other elements of Windows 95.